No. 7170

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSE MAYOLA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

The indictment was in twelve counts, the defendants being named in the first count as Albert A. Armstrong, Edward A. Campbell, and Jose Mayola, and referred to as "said defendants" in all of the remaining counts. Prior to the trial, Herbert Walkup, confessed conspirator, and the dominating though stupid instigator, committed suicide, and his name was crossed off the indictment, although he was allowed to be resurrected during the trial, and his name and what he said was continually before the jury. Armstrong made a full confession prior to the trial, and pleaded guilty during the trial. Defendant Mayola was acquitted on all counts excepting the ninth count, which charged a conspiracy among said defendants, and with other persons to the grand jurors unknown. The Judge sentenced Mayola to be

imprisoned for a period of two years, and pay a fine of $2500.00. Mayola alone appealed.

The government proved a conspiracy, as charged among said Armstrong, said Campbell, and said Walkup by witnesses who gave testimony tending and sufficient to prove the following facts:

At all times hereinafter mentioned, said Walkup lived with his wife, the witness Helen Walkup, in a bungalow at number 1638 Eighth Avenue, in San Francisco, California (hereinafter called "the Walkup house"), and owned and conducted a business known as Walkup Map Company at number 634 California Street, San Francisco, California (hereinafter called "the Walkup office"). By 1931, Walkup was in debt and in bad financial condition. About September, 1931, two strangers, one Johnson and the defendant Armstrong, seeking employment as lithographers, called upon Walkup at the Walkup office. Walkup told them that he intended to put in a lithographing plant, but would have to wait for several weeks because the man who was to finance it was in the East, in New York or Washington. In the course of three or four weeks, or about October, 1931, Walkup asked Armstrong and Johnson whether they would consider going to South America at pay of one hundred dollars a week and bonus of ten thousand dollars at the end of a year, and when questioned as to why the pay and bonus would be so large, Walkup stated that he wanted Armstrong to go down there and counterfeit Colombia money. Armstrong and Johnson refused. Meanwhile, about the middle of 1931, defendant Campbell had requested one Richard Dineley (an

exporter of arms and munitions) to introduce Campbell to a consul of some Central American country, so that Campbell could broach to the consul a scheme of counterfeiting foreign bonds or money. Dineley forthwith secretly informed the San Francisco agent in charge of the Secret Service of the United States Treasury, and kept said agent secretly informed from time to time thereafter. Dineley led Campbell on until, about January, 1932, Campbell stated to Dineley that he, Campbell, had a contact with counterfeiters, and wanted Dineley to become Campbell's agent to connect with Central American people who would enter such a transaction; and it was finally arranged that Campbell was to submit to Dineley a sample or proof of a counterfeit Colombian ten dollar bill. About a month before, Walkup had telephoned to Armstrong and requested the latter to call again at the Walkup office. Armstrong did so, and was told by Walkup that he and Campbell knew where they could buy a camera. Walkup, through Campbell, bought the camera from the witness Craik, the camera being the photographic part of a photo-engraver's outfit. Walkup and Armstrong hauled the camera in Walkup's truck to the Walkup office, where Walkup, Campbell and Armstrong installed it in a specially built dark room. A printing press was obtained and was installed by Campbell and Armstrong in the Walkup house. Armstrong had not had previous experience with a camera, and therefore spent three or four weeks practicing with it before succeeding in getting proper negatives from which to produce a proof or sample of a

counterfeit Colombian note for Campbell to submit to Dineley. About January, 1932, a negative or film of a Colombian bill was photographed by Armstrong, transferred to lithographing stones (purchased in the regular course of business by Walkup from the witness Madsen, a dealer therein), and therefrom a printer's proof was struck off by Armstrong on the press in the Walkup home. Dineley called at the Walkup office, examined the proof, and rejected it, saying that it was a cheap lithograph, and that he had expected a steel engraving. When Dineley left, a quarrel arose betwen Campbell and Armstrong, and Armstrong ordered Campbell to leave the office, which the latter did. In the interim, however, early in January, 1932, Campbell had unsuccessfully tried to interest the witness Acheson (whose business was Latin American investments) in arranging to make deliveries of counterfeit money to such persons as Campbell might designate in Latin America. Finally, in February, 1932, Armstrong commenced preparations to counterfeit ten dollar gold certificates of the United States of America, series of 1928; made photographic films thereof with the camera at the Walkup office, transferred them to lithographing stones, and printed the counterfeits on the press at the Walkup home, a total of 1260 bills printed three to a sheet, which were later cut into single bills on a cutting machine at the Walkup office. Walkup told Armstrong that he, Walkup was going to take the counterfeit bills to Panama where he was to receive for them twenty-five per cent of their face value, or a total of three thousand dollars, with which he would

return to San Francisco and start a legitimate lithographing plant in partnership with Armstrong. One of the counterfeit bills was received on April 7, 1932, by the Federal Reserve Bank of San Francisco, having been passed in San Francisco about April 6, 1932. The printing and cutting were completed by April 8, 1932, and the press in the Walkup home was dismantled on that day. On April 9, 1932, Walkup sailed from San Francisco for Panama on the ship Virginia of the Panama Pacific Line, with the 1260 counterfeit bills in a home-made money belt on his person. Walkup subsequently returned to San Francisco with about 300 of the counterfeit bills, and told Armstrong that the deal had gone flat and that he had left the remainder of the counterfeit bills in Panama, and got nothing for them; and together they burned the remaining 300 bills. Thereafter, on July 27, 1932, Secret Service agents Geauque and Moffitt searched the Walkup office and the Walkup home, and seized the camera and photographic materials and paraphernalia and a film of the counterfeit ten dollar gold note at the former, and the lithographing stones at the latter, all of which were identified and proved at the trial to have been used in the manufacture of the 1260 counterfeit gold notes; and on that day, July 27, 1932, Walkup became a suicide. (Tr. of Record pp. 10-15.)

ARGUMENT.

DEFENDANT MAYOLA DID NOT HAVE A FAIR TRIAL AS GUARANTEED BY THE CONSTITUTION.

Transcending all of our assignments of error and exceptions to evidence improperly admitted in this case, is the fact that Mayola did not have a fair trial.

Mayola was arrested in New York, and after a thorough search of his belongings, and subsequent checking up with his business connections, which satisfied the Government agents there, that he was a mining man, in contact with such men as Mr. Bonbright, Mr. Dibbs, and the International Mining Company, he was released. About ten days later he was arrested again, and searched, without finding any vestige of incriminating evidence. At the time of his arrest, without aid of counsel or any one else, he voluntarily made a statement to Government agents which did not vary from his story on the witness stand.

The prosecuting attorney told the jury that there was not much evidence connecting Mayola, but this was because he was a glib talker, and clever, and not because he was innocent. As the trial progressed it became more apparent that unless the Court let down the bars in the admission of evidence Mayola could not be connected, so the bars were let down and a flood of evidence was admitted which we shall later prove was absolutely inadmissible. Not only this but after Mayola took the stand and told a convincing story, the learned Judge alternated with the prosecutor in cross-examining Mayola, and his cross-examination was so exceedingly long drawn out, and so searching, and so partial, that reading the record

(Transcript of Record pp. 48-65) the obvious reaction is that the learned Judge was by far the better prosecutor. Not only this, but by recross examining Mayola, it almost seemed as if Judge and prosecutor were acting in concert, to convict this man. Even though the Court was acting in good faith, and with no intention of being biased, the bald fact remains, that a jury could not escape such an inference. Such conduct on the part of the Judge was all the more damaging, because the learned Judge has a reputation for fairness and impartiality.

We submit that the Supreme Court in *Quercia v. U. S.*, Adv. Op. 996, Sup. Ct. Rep., Vol. 53, p. 698. In reversing judgment in the case the Court expressed these facts delicately:

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. * * * *The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'.* * * * It is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf * * * His characterization of the manner and testimony of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice

which would preclude a fair and dispassionate consideration of the evidence * * *"

The Circuit Court (8th Circuit) in *Sunderland v. U. S.*, 19 F. (2) 202 in granting a new trial said:

"Was there a fair trial? * * *

We do not think these extended remarks of the Court constituted simply a fair judicial interpretation of the indictment. *They come more nearly being a second opening statement for the prosecution * * * And we do not think that the jury could listen to the statement made by the Court relative to the case without receiving an ineradicable impression in their minds that defendants conspired to cheat and defraud * * **

The term 'fair trial' is often used but not often defined. It is of broad scope. It means a trial conducted in all material things in substantial conformity to law. *It consists not only of an observance of the naked forms of law, but in a recognition and just appreciation of its principles.* It means a trial before an impartial judge, an impartial jury and in an atmosphere of judicial calm. *Being impartial means being indifferent as between the parties.* It means that the acts and language of the prosecuting attorney are subject to control, that his duty consists not in securing conviction at all hazards, but in ascertaining the truth. It means that the defendant shall have a fair opportunity through his counsel to outline his defense to the jury. It means the right of cross-examination shall be respected. *It means that* while *the judge* may and should direct and control the proceeding, and may exercise his right

to comment on the evidence, yet he *may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror.* * * *

It may not be amiss to call attention that a large part of the evidence * * * was clearly inadmissible * * * some of it consisted of hearsay evidence * * *"

In the case of *O'Shaugnessy v. U. S.*, 17 F. (2) 225, the Appellate Court said:

"General statements in the charge * * * did not cure the fault * * * of lack of impartiality in submitting the evidence to the jury or justify the Court in making one sided recitals of evidence or in furnishing arguments in behalf of only one side of the issue as to which the evidence was conflicting * * *"

We shall quote briefly from the transcript (Tr. pp. 47-66) setting out the questions of the trial Judge, and leaving out the answers.

"(At this point the court interrupted the testimony of the witness (Mayola) with the following cross-examination by the court):

The Court. Do you keep a set of books in your business?

You don't keep a set of books then. You keep a memorandum, is that it?

Your business is small now?

I was talking about before you were arrested. Was your business a large business or small business before you were arrested?

Your business was worth a million dollars or more provided you could sell some of these properties in Colombia; is that it?

We understand that. You are merely what is known in the American sense, a promoter?

You told the jury here that you owned about 600,000 acres?

But you keep no books with regard to that?

I say you keep no books of account now?

All the bookkeeping you did was to make a memorandum once in awhile?

Any profits, of course, that you would make from a business of that kind are problematical, are they not?

On paper?

Was that sometime ago?

At any rate you have no books of account in your business?

Do you have your books back in New York?

Is that the memorandum you speak of?

Is that the book of account?

That is the only book of account you have?

(Direct examination resumed by Mr. Tramutolo.) * * *

(Cross-examination by the Court.)

The Court. Q. Referring to this memorandum book, Defendant's Exhibit F, will you please read the entry in that book which refers to this loan to Walkup.

How long had you known Walkup?

Did you meet Walkup frequently?

Were you and he very friendly?

You had no business with him?

And, therefore, you were not very friendly with him.

Did he come to your house?

And you didn't go?

He visited your house two or three times?

And you didn't go to his house?

You never have been to his house but one time? When you went to Panama did you and Mr. Walkup occupy the same stateroom?

Nobody else in that stateroom?

You felt friendly enough to him to occupy the same stateroom with him, did you not?

You preferred to be with him than to be with a stranger, is that it?

You did not wish him in your stateroom, and you did not wish to ask to have him put out, is that it?

And you didn't have any particular reason for occupying the same room with him?

You knew him, and you preferred to have him with you in that stateroom, rather than a stranger, as I understand it, is that it?

You were not consulted about it at all?

He never spoke to you about it?

He did that without your consent?

Do you wish to give the jury to understand that you were not friendly with Mr. Walkup?

He was just a casual acquaintance of yours: Is that it?

You were not afraid to talk to anybody, were you?

Were you afraid to talk to people in the United States?

You told us you were educated in Europe?

And that you worked in a bank in England?

And I take it that you have traveled around quite a bit?

Do you mean to tell the jury that you were afraid to speak to anybody in the United States?

You wanted them to believe you were minding your own business: Is that it?

And you didn't care particularly about your neighbor Mr. Walkup: Is that it?

He could mind his business and you would mind yours?

And you didn't care for him, at all?

There was nothing between you, was there?

Not a thing?

He came to your house one morning and you say he was drunk?

Was he very drunk?

Your son said he was staggering: Was he staggering?

Your son said he was staggering, and you said that you told your son you didn't want to have anything to do with him if he was in that condition: Is that right?

But you went out and talked to him?

And upon his insistence that you come with him, although you do not drink, you went with him to his house?

You thought he would take you there by force, did you?

You just told us he was a weak man. He could not compel you to go unless you wished to go?

And you went because you thought that was the best thing to do?

Although you were not a drinking man.

And you went over to his house?

You traveled on the same boat and occupied the same stateroom on your trip to Panama?

You were with Mr. Walkup a good deal on that trip, were you not?

You got to know him quite well?

You grew to know him better when you were on that trip?

He drank all during that trip, did he?

Was he drunk most of the time?

But he was a very hard drinker?

It was disagreeable having him in the same stateroom.

Did his actions on the boat hurt you, did they bother you?

You didn't know him very well, didn't care for him very much, just a neighbor who was endeavoring to force his attentions upon you, and you didn't care for him, and yet you loaned him $500?

When you loaned him that $500 you thought he was in dire need of money, in great need of money?

He told you all of his private affairs?

Then this $500 I understand you gave him to pay some of his debts?

To save his home for himself and his children?

And, as I understand it, within a few days afterwards he told you he was going to Panama with you?

Did you say anything to him about that?

You didn't ask him why it was he was using the $500 you gave him to go to Panama when he should pay the debts on the house and the debts that he owed?

Did he tell you how much?

When you arrived at Panama you took Walkup with you and introduced him to your friends, didn't you.

You took him and introduced him to Posso?

You stayed in Ibanez's house?

And I understand you to say that all the time you were a guest at Ibanez's house, Walkup spent most of his time drinking liquor and carousing with sailors and soldiers?

Look around and get drunk: Is that it?

Most of the time wasn't he?

And yet you trusted him to bring your adopted daughter back to the States?

You put her in care of Walkup rather than in care of a nurse on the boat?

You told Walkup?

Then it is not so that you put the girl in the care of Walkup?

In a statement that Walkup made to Captain Foster, he said that when he was at the Ibanez ranch, or at some time when you were present, he gave Ibanez $3000 of this counterfeit money: Is that so?

Did you ever discuss counterfeit money with Walkup?

Just what did he tell you he wanted to go to Panama for?

You knew it was a foolish trip for him to take, did you not?

You knew as you stated, there was no business in map-making in Panama?

You introduced him to Ibanez and recommended him?

When your friend Posso arrived, did you introduce him to Walkup?

Who had his legs swollen?

Did you introduce him to Posso?

And when you left Panama you left Walkup there?"

(After the foregoing cross-examination by the Court, there followed the following cross-examination by the prosecutor): * * * *

Further cross-examination by the Court:

"Why didn't you tell him to pay his debts and stay home?

A. That was my idea, your Honor.

Why didn't you tell him that?

A. I did.

Why didn't you tell him to pay his debts and stay home?

Were you over there many times?

Is it true you took the $500 down there and gave it to him?''

Further cross-examination by the prosecutor. * * *

We submit to this Court, after reading this exhaustive and searching cross-examination by the Court, which was not applied to any government witness or any other witness, could the jury possibly remain free from doubt that the Court did not believe that Mayola was telling the truth, but paraded before the jury the damaging statements, of the dead man Walkup, including a statement made by him after his arrest to Captain Foster, a government agent, which was clearly inadmissible against Mayola, as arrest ended the conspiracy under any circumstances. We submit, that the above action of the Court, being more than ''his lightest word or intimation'', was ''received with deference'' and did in fact prove ''controlling''. Such conduct is more in accord with the principles of French jurisprudence where the judge also acts as prosecutor, than with our Constitution. ''Being impartial means being indifferent as between the parties * * * he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror.'' *Sunderland v. U. S.,* supra.

As was said by the Circuit Court in *Lemon v. U. S.,* 164 F. 959:

> "A mere reference to the complaint made, will, we are confident, be a sufficient caution to the learned trial judge distinguished for his general fairness and impartiality to secure a fair and dispassionate second trial."

Among other things the prosecutor advised the jury that character witnesses for Mayola were not important, as anyone could get character witnesses. Even though no exception was made, and the Court gave the usual stock instruction in this regard in view of the entire atmosphere pervading this trial, we think this Court should consider it along with the definition of fair trial.

As was said in *Sunderland v. U. S.,* supra:

> "The value and effect of good character as a sponsor of innocence of its possessor, when accused of crime was long ago stated in this Court. Time Pub. Co. v. Carlisle, 94 F. 762: 'A good name is rather to be chosen than great riches and loving favor rather than silver and gold.' The respect and esteem of his fellows are among the highest reward of a well spent life. *A man of affairs, a business man* who has been seen and known of his fellow men in the active pursuit of life for many years and who has developed a good character and an unblemished reputation has secured a possession more useful and more valuable than lands or houses or silver or gold. * * * Every man is presumed to be innocent of wrong until he is proved to be guilty, but when a heinous crime is charged upon a man whose character and reputation for honor and integrity have been unquestioned for years in the community in which

> he has lived, *that character and that reputation stand sponsors for his innocence and raise a still stronger presumption which accompanies him* in public and private, *in court* and in council and in every situation in life and which is acted upon and recognized daily by all men,—*a presumption that such man would not be guilty of such a crime* * * *"

It may be said in this regard that counsel "should have requested the jury to disregard the remark * * * it is doubtful whether the harm could have been thus remedied". *Sunderland v. U. S.,* supra.

Again, the questions asked by the prosecutor of William T. Dinneen, on cross-examination (Tr. Record p. 33) in which he was able to get before the jury the intimation that Sixto Posso, a friend of Mayola's, had been arrested in Colombia in connection with this counterfeit plot and was then in jail, when the Government never attempted to introduce any such evidence, was improper and constituted grave error, and prejudiced the jury against Mayola.

As was said by the Court in *Mercer v. U. S.* (14 F. (2) 281), in a similar circumstance where the prosecuting attorney was attempting to get before the jury damaging information in violation of all the rules of evidence:

> "Mr. Reglogle. Is it not a fact Mr. Hamill, that you knew that Harry Mercer at the time you sent him out to sell stock among your friends at Jacksonville had been convicted and had served sentence for forgery and for fraud?
>
> A. No sir.

The unfairness of the question or question and statement combined, consists, not only in its admissibility in any form, but in the particular form in which it was asked. He did not ask if the defendant had been convicted of crime, but stated that he had been and then asked the damaging question, to which there could, in view of what the witness had just said, have been an answer. The defendant was presumed to be innocent until his guilt of the offense charged was proved.

The evident purpose of the District Attorney and what he actually did was to get before the Jury in violation of all rules of evidence, damaging statements, put in the form of questions which greatly prejudiced defendant. * * * That Mercer and not Hamill was on trial seems to have been overlooked. * * * Hamill's credibility might be affected by the admission of proper evidence, but his credibility could not be affected at the expense of a fair trial, Hamill had to be impeached if at all on admissible evidence. *However depraved in character, and however full of crime the past life of defendant might have been, he was entitled to a fair trial on competent evidence.* Boyd v. U. S., 142 U. S. 450, 35 L. ed. 1077. *Otherwise our courts would cease to be courts of law and become courts of men. Liberty regulated by law is the underlying principle of our institutions.* Sparf et al. v. U. S., 156 U. S. 51, 39 L. ed. 343.

These statements were improper, prejudiced and rendered a fair trial impossible. Case reversed."

We are addressing this phase of our appeal to this Court, sitting not as a mere arbiter of technical rules, but sitting as an appellate tribunal exercising its inherent power under the Constitution to guarantee that there shall be no miscarriage of justice. As was said in *Edwards v. U. S.,* 7 F. (2) 357, 360:

> "Regardless of the *condition of the record* precluding any right of defendants to demand a review of the alleged errors and independent of any provision of the Judicial Code, we have * * * *exercised our inherent power* to determine whether or not there is such a lack of evidence as to make the conviction of defendants a miscarriage of justice."

And again this was pointed out in *Tinsley v. U. S.,* 43 F. (2) 890, 892:

> "Even though no motion was made by Tinsley for an instructed verdict, as the evidence was insufficient to sustain the conspiracy count of the indictment, we are compelled to hold that his conviction on that count cannot stand."

Or as the Court said in *Peru v. U. S.,* 4 F. (2) 880, 884:

> "A conviction of a crime with no evidence to support it whatever presents upon the whole record such a palpable and manifest error as warrants the appellate court in considering it, even if there be no assignment of errors. * * *"

Another case evidencing this exercise of power is *Corliss v. U. S.,* 7 F. (2) 455, 458:

> "Taking an exception does not add to the challenge or in any way aid the Court. It is therefore

idle, and failure to take it does not waive the objection."

The reason for this broad spirit of appellate scrutiny is set out in *Sykes v. U. S.,* 204 F. 900, 912:

> "It is that in a criminal case, where the life, or *as in this case the liberty of the defendant is at stake,* the courts of the United States, in the exercise of a sound discretion, may notice such grave error as his conviction without evidence to support it, although the question it presents *was not properly raised in the trial court, by request, objection, exception or assignment of error.* * * *"

We now ask you to give your regard to another grave error, which the Court made in instructing the jury, and which in view of what had gone before, could not but prejudice Mayola and deny him a fair trial.

On page 68, transcript of record, the judge charged the jury:

> "The word *'conspiracy' is not difficult* to understand. * * * Agreements to commit crime are necessarily of a secret nature and usually difficult of discovery, and it is *generally necessary to prove them by proof of facts* from which a *jury may fairly and reasonably infer the existence of the agreement.* * * * *A conspiracy may be proved by proof of facts from which it may be fairly inferred* that the parties had a (52) common object and that the act or acts done by each of the parties, though the acts may be different in character, were all done in pursuance of a common end and calculated to effect a common purpose; that the parties steadily pursued the same

> object either by the same means or by different means, but all leading to the same result * * * (continuing on page 72).
>
> Thereafter the jury retired and *after deliberating four hours* returned into court with a verdict acquitting defendant Mayola on all counts of the indictment, excepting the Ninth, or conspiracy, Count, under which count the jury found the defendant Mayola guilty (55)."

In the above charge the judge made grave error, and even then the evidence was so unsubstantial, so full of hearsay, so full of suspicions, and inferences, that it took the jury four hours to convict Mayola. But the judge's instruction was so damaging that it could not be cured, and irrespective of any exception constituted such an unconstitutional statement, as brought Mayola under the protection of that great guaranty of individual rights. In saying this we are borne out by the words of many learned appellate judges, and their confreres.

> "In other words, a conspiracy is not an omnibus charge, under which you can prove anything and everything and convict of the sins of a lifetime."
>
> *Terry v. U. S.*, 7 F. (2) 28, 30.

Continuing, this decision challenges the very instruction before this Court:

> "The instruction is as follows: * * * If you find the acts * * * give rise to *a reasonable and just inference* that they were done as the result of a previous agreement then you are justified in finding a conspiracy existed between them to do

the act. The *portion* of the instruction *does not contain a correct statement of the law.*"

Rather the Court goes on to point out the true statement of the law is:

> "'It is also true in cases of conspiracy * * * that the prisoner is *presumed to be innocent* * * * and where that *proof is in whole or in part circumstantial* in its character, the *circumstances* relied upon by the prosecution *must so distinctly indicate the guilt* of the accused as to *leave no reasonable explanation* of them which is *consistent with the prisoner's innocence.*' U. S. Lancaster, 44 F. 894, 896. * * *
>
> 'If the evidence can *be reconciled either with the theory of innocence or with guilt,* the law *requires* that the defendant be given the *benefit of the doubt* and that the theory of innocence be adopted.' U. S. v. Richards, 149 F. 443, 454."

Thus in view of the above case we submit that the learned trial judge's instructions are in direct opposition to the above fundamental principles of law. In *Hart v. U. S.,* 240 F. 911, 914, it was pointed out:

> "However badly managed * * * however ill advised, unattractive or even dishonorable the method of raising money * * * *it remains necessary,* if the criminal law is invoked, *to show beyond reasonable doubt* not only bad management, negligence, dishonorable conduct but *guilt of the particular crimes alleged.* * * *
>
> *It is notoriously true that in prosecutions such as this the conspiracy count is tacked upon the principal charge for the purpose (well known if not avowed) of widening the field of evidence*

> *and introducing a large number* of *occurrences wholly unrelated to the actual fraud* of which the defendants are accused in order to show coordination of effort on the part of the alleged conspirators from which the agreement or consent of minds (*the gist of conspiracy*) may be inferred."

In other words, the very gist of the crime is the meeting of minds, and the judge instructed the jury here, that this might be reasonably and/or fairly inferred. The Circuit Courts of this country, being in effect almost a supreme tribunal and

> "having a responsibility for the enforcement in this Circuit not only of the National Prohibition Law but of Federal laws generally, are strongly of the opinion that the conspiracy statute should not be stretched to cover and misused to convict for offenses not within its terms, and when resorted to, the conspiracy must be proved as charged."
>
> *Wyatt v. U. S.*, 23 F. (2) 791, 792.

Such

> "possibility * * * inevitably flows from the settled habit of prosecutors (in this circuit at least) of hitching a conspiracy charge to a substantive count."
>
> *Hart v. U. S.*, supra.

As was said in *Cooper v. U. S.*, 9 F. (2) 216, 226:

> "We reach the conclusion that the case must be reversed and a new trial granted. This is regrettable in view of the time and expense which has been, and must be consumed and incurred. *However the case is of great importance in its*

> *bearing upon private reputation and public justice.* Upon the record the *guilt of defendants was an open question.* In such case, *slight departures* in procedure *may be determinative.* While in a clear case we might hesitate to reverse upon many of the errors discussed, *all taken together,* compel the feeling that justice to the defendants and government alike, requires a second test in which the matter complained of may be largely, if not entirely eliminated."

We therefore beg this Court to scan the record of this case because of the unusual circumstances, and the verdict of the jury. It seems to be settled law, that if a conspiracy count is hitched to as many substantive counts as in this case, and the defendant is either acquitted of all substantive counts, and convicted of conspiracy, or acquitted of conspiracy and convicted of the substantive counts, the Appellate Courts will consider the result so unusual and peculiar that they will delve carefully into the record to see if the defendant is not in the position that under cover of the unsuccessful charge, the successful one, over due objection, has been bolstered up. In *Hart v. U. S.,* supra, the Court said:

> "The overt acts in the conspiracy count are to a considerable extent covered by the nine substantive counts. * * * The plan was not fully carried out. * * * All this testimony formed part of a connected story, not charged to be criminal, except as it tended to show confederation, *yet it could not but create serious prejudice* against those persons who (whether they had conspired or not) had taken a larger or smaller part in the negotiation and sale of promissory paper

issued and received in a manner repugnant to the mind of any prudent and scrupulous business man.

Thus the action of the jury in *acquitting* all of the defendants of the *conspiracy charge,* has under the circumstances, *laid a heavy burden on the prosecution to uphold the conviction for the substantive offense.* The verdict of not guilty of conspiracy left for the jury's inevitable consideration a mass of testimony immaterial to the issue passed upon adversely to these plaintiffs in error and their co-defendants and yet *extremely prejudicial* to them * * * but to acquit of conspiracy and convict of substance, *produced a condition requiring the scanning of the record to ascertain* whether, under cover of the unsuccessful charge the successful one, over due objection, has been bolstered up."

In the case of *Morris v. U. S.,* 7 F. (2) 785, 791, the Court said:

"The government carries a *heavier burden* where it seeks a *conviction under section 37 for a conspiracy * * * because it must prove intent.*"

The Court went on to say that the defendant has been acquitted on all substantive counts, and only convicted on the conspiracy count.

"The findings are not inconsistent as was the case in Rosenthal v. U. S., 276 F. 714; Peru v. U. S., 4 F. (2d) 881. * * *

We have examined the record with *some anxiety because of the rather peculiar result of the trial,* but we are satisfied there are no errors affecting the substantial rights of defendant * * *"

Not only this, but where an acquittal of such important counts is brought in, it is settled law that the verdict must be supported by evidence other than the facts set out in the counts acquitted upon. In *Peru v. U. S.,* 4 F. (2) 880, 884:

> "The court instructed a verdict on the counts charging sales, and possession of intoxicating liquor, and the jury found Bird guilty on the fifth count, in maintenance of a common nuisance. If the government relies on the facts stated in the first four counts to sustain the fifth count, the judgment cannot stand. *The verdict as to that count must be supported by evidence other than the facts set out in the first four counts.*"

This language is strongly endorsed in *Murphy v. U. S.,* 18 F. (2) 509, 512, where the jury acquitted on the first count:

> "The verdict of guilty on the third count must be based upon evidence other than that pleaded in support of the first count. It remains to be considered whether there is such evidence. The sale element being eliminated we are forced to *rely entirely upon proof of possession* accompanied by facts tending to show that Murphy's place was maintained for keeping and selling intoxicating liquors. * * * *No one saw* any liquors taken from one place to the other, *no one saw* any sale or disposition. As to both things we are committed *entirely to suspicion.* * * * *Courts should not strain the principles established for the protection alike of society and those accused of crime.*"

In the case of *U. S. v. Renda,* 56 F. (2) 601, the Court said:

"The evidence against defendant Renda was adequate except for the character of the witness. * * * His credibility was tenuous to the last degree. The accepted canon in such cases is that when the evidence is substantial the verdict is final. The eighth circuit did refuse a conviction. * * * and Dahly v. U. S., 50 F. 2nd 237, was a similar ruling without reliance upon that apocryphal doctrine. Just what 'substantial evidence' is Courts have never declared, and probably cannot. * * * *Courts do not attempt to weigh the evidence by other scales than in civil cases. And yet the whole notion depends upon the graver consequences of a criminal prosecution, with its attendant requirement of more persuasive proof.* Whether this should be reflected in a stiffer treatment of the evidence necessary to allow submission at all is an open question. * * * We are not in agreement * * *"

THE COURT ERRED IN ADMITTING OVER PROPER OBJECTION THE TESTIMONY OF DEFENDANT ARMSTRONG, OF CONVERSATIONS IN WHICH WALKUP INVOLVED DEFENDANT MAYOLA, WHO WAS NOT PRESENT AT THE TIME AND WHO NEVER AUTHORIZED WALKUP TO ACT AS HIS AGENT IN THIS REGARD. NO AGREEMENT WAS SHOWN TO HAVE EXISTED PRIOR TO THIS TIME INVOLVING MAYOLA, AND THE CONVERSATIONS WERE NOT IN FURTHERANCE OF THE ALLEGED CONSPIRACY. THIS ERROR WAS EXTREMELY PREJUDICIAL TO MAYOLA.

For the purpose of brevity, we shall take up these assignments of error together, I, II and III, Transcript of Record, pages 75-78, as follows:

"I.

The District Court erred in admitting the following evidence over the objection and exception of defendant Mayola: during direct examination of the Government's witness Albert A. Armstrong, the prosecutor put to him the following question: 'Q. Do you recall a conversation with Mr. Walkup and Mr. Mayola in April, 1932, concerning the payment for the expenses of the trip to South America?' Counsel for defendant Mayola objected to the question as leading and suggestive, and, further, that Mr. Mayola had not been connected with the conspiracy. The prosecutor stated that the contention of the Government was that the conspiracy is still in effect and was up until the time of the arrest of the first conspirator. Thereupon, the court overruled the objection and an exception was noted (Exception No. 1). The full substance of the evidence admitted over that objection and exception was as follows: 'A. I have never had any conversation with Mr. Mayola, nor in his presence, in regard to the payment of expenses of the trip or anything of that sort; Mr. Walkup told me that he had got $500.00 from Mr. Mayola for the expenses of the trip and Mr. Walkup divided the $500.00 with me, so that I could have $250.00 of it while looking after Walkup's business while he was away; he said he might be gone three months.'

II.

The District Court erred in admitting the following evidence over the objection and exception of defendant Mayola: in the course of the direct examination of the Government's witness Albert A. Armstrong, the witness testified that the first

time he heard of Mr. Mayola was along in October, 1931, in a conversation with Mr. Walkup; thereupon the prosecutor put the following question to the witness: 'Q. What was that conversation?' Counsel for defendant Mayola objected to the question upon the ground that the question called for hearsay. The Court overruled the objection and an exception was noted (Exception No. 2). The full substance of the evidence admitted over that objection and exception was as follows: 'A. Myself, Mr. Johnson and Mr. Walkup were present and I said to Mr. Walkup that I must know who these people are who want me to go to work in South America, and Mr. Walkup said that it was his next door neighbor, Mr. Mayola, who was going to put over a big deal in South America and was going to put in the lithograph plant.'

III.

The District Court erred in admitting the following evidence over the objection and exception of defendant Mayola: in the course of the redirect examination of the Government's witness Albert A. Armstrong, the witness testified that all that he knew about the defendant Mayola was what he was told by Mr. Walkup between November, 1931, and April 9, 1932; thereupon the prosecutor put the following question to the witness: 'Q. What was the approximate date of the first conversation?' Counsel for defendant Mayola objected to the question upon the ground that the question called for hearsay. The Court overruled the objection and an exception was noted (Exception No. 3). The full substance of the evidence admitted over that objection and

exception was as follows: 'A. I would say that was along about the time when I started to talk to him about getting nervous about getting the plant in. Then when he told me that they wanted me to go down to South America,—then he told me at that time that Mr. Mayola was a big man down there and that I didn't have anything to fear in detection; it was an easy way to make ten thousand dollars; I would have all the protection from the government officials down there; I would be perfectly safe. That was what he told me at that time.' "

There can be no doubt after reading these questions and answers, that their effect upon the jury was most prejudicial.

Not only this but the statements by Walkup were untrue on their face. In Assignment II Armstrong testified that "the first time he heard of Mr. Mayola was along in October, 1931. * * * and I said I must know who these people are who want me to go to work in South America, and Mr. Walkup said that it was his next door neighbor, Mr. Mayola, *who was going to* put over a big deal in South America and *was going to* put in the lithograph plant". As a matter of fact Armstrong never went to South America, and the lithograph plant was being torn down, before Mr. Mayola loaned Walkup the $500.00. This answer was therefore not only inadmissible as hearsay, but also as not even the statement of a fact, but something which existed only in the brain of Walkup, a plan of future action, of what he was going to do, which plan never came true.

In Assignment III, Armstrong was allowed to testify in the same vein, the hearsay thus admitted was what *would* happen. "I started to talk to him about getting nervous about getting the plant in * * * they wanted me to go down to South America, * * * that Mr. Mayola was a big man down there and that I didn't have anything to fear in detection; it was an easy way to make ten thousand dollars; I *would* have all the protection from the government officials down there; I *would be* perfectly safe."

In Assignment I Armstrong was allowed to testify, "I have *never had any conversation with Mr. Mayola nor in his* (59) *presence,* in regard to the payment of expenses or anything of that sort; Mr. Walkup told me that he had got $500.00 from Mr. Mayola for the expenses of the trip and Mr. Walkup divided the $500.00 with me, so that I could have $250.00 of it *while looking after Walkup's business while he was away;* * * *" Again we have one conspirator talking to another, without any authorization involving a third party, not then present, and such statements were not made in furtherance of the conspiracy. In fact the money given to Armstrong was for the purpose of looking after Walkup's business which was a legitimate business, and we can hardly see where it was in furtherance of the conspiracy.

A case on all fours with the above facts is *Kuhn v. U. S.,* 26 F. (2) 463, in which the Court said:

> "Upon a re-examination of the record we have concluded that we were in error in holding the evidence sufficient to warrant a finding beyond a

reasonable doubt that the defendant Moon participated in the enterprise with knowledge of its unlawful character. The most material circumstance against him was that he was on or about the Talbot the night the arms were taken aboard. But they were in boxes or cases and he may very well have been ignorant of the contents or their destination. We think too, we failed to attach due significance to the fact that Borreson who freely gave evidence for the government at no time testified that there was any communication to Moon touching the real object of the voyage. Moon is not shown to have had any connection with any of the parties prior to his employment. * * * *True Borreson testified that either Swinehart or Gum told him, but not in the presence of Moon, that Moon should have a half share or $500.00 interest. But giving to the rules of evidence in conspiracy cases the widest reasonable latitude, we are aware of no principle under which the declaration of one conspirator to another is competent to establish the connection of a third person with the conspiracy.''* Reversed as to Moon.

The language of this case applies equally to the testimony of Mrs. Walkup, which we shall bring before the attention of this Court. She was a conspirator with her husband and others if there was any conspiracy irrespective of whether the government prosecuted her or not. The statement of her husband to her was the statement of one conspirator to another not in furtherance of the conspiracy and not in the presence of Mayola, and thus is not competent to connect Mayola with the conspiracy. We shall take

up her evidence later for the reason that it involves other objections.

Another case directly in support of our contention is *U. S. v. Renda,* 56 F. (2) 601, in which the Court pointed out:

> "The only evidence against D'Agostino was that *one of the conspirators DeFranco was heard to call some one on the telephone and ask if 'Dominick D'Agostino' was speaking.* Apparently receiving an affirmative answer, DeFranco then asked the listener to bring 'tenpieces' which concededly referred to morphine in which the conspirators were dealing. The *telephone number called was registered under D'Agostino's name* in the telephone book. *The evidence of course was hearsay* for the identity of the person called depended upon DeFranco's voice, whom he knew. *The theory of its admission apparently was* that since DeFranco was abundantly shown to be acting in *criminal concert with* defendants *other than D'Agostino any admission of his was competent against all who had been indicted. The error is however apparent.* The declarations of one party to a concerted mutual venture are admitted against the rest on the notion that they are acts in its execution. * * * In so far as they are such they are authorized by all and are treated as their admissions. *However obviously the declaration cannot prove the authority any more than that of an agent. The party to be implicated must be shown independently to be in fact a party to the venture, else there is no authority to act for him.* Before DeFranco's declaration, itself only implied from his conduct, could be competent against D'Agostino, D'Agos-

> tino must therefore have been otherwise shown to be acting in concert with DeFranco and that concert such that the declaration was apt to its execution. *As nothing of the sort was shown the case against him failed.* * * *"

Again in *U. S. v. Logan,* 45 F. 872, 889, this is reiterated:

> "But to establish the connection of either of the defendants * * * with the conspiracy * * * *such connection must be shown by other proof than the declarations of others made out of the witness box and not in the presence of the defendant charged, and this applies as well to the declarations of any one of the defendants, made not in the presence of the one whose connection or not with the conspiracy is being considered.* Each of the defendant's own declarations made at any time, and the declarations of any other persons made in his presence are competent to be considered in passing on the question as to whether said defendant was *connected* with said conspiracy."

A similar declaration came before the Court in *Bryan v. U. S.,* 17 F. (2) 741, and the Court reversed the lower Court saying:

> "Mrs. Sherban further testified that on the morning after the seizure plaintiff in error's wife telephoned her that the E-301 (a boat) had been seized and later on the same day Ison the man who was seen on the beach near the place where the boats landed, called at her home, stated he was the plaintiff in error's brother-in-law and asked her if she knew that the E-301 had been seized and

that she replied that Mrs. Bryan had telephoned to her. Plaintiff in error did not object to Mrs. Sherban's testimony in regard to his wife, but he did object and except to a question which elicited Mrs. Sherban's answer to the effect that Ison asked her if she knew that the E-301 had been seized.

We are of the opinion that the ruling complained of constitutes prejudicial error. Ison's conversation with Mrs. Sherban tended strongly to show that he made an attempt to conceal evidence that plaintiff in error was the owner of the E-301. *The attempt could not be attributed to plaintiff in error in the absence of proof that it was made by his authority or with his knowledge or consent* * * * Ison was seen by government witnesses near the place where the boats were landed in pursuance of the conspiracy, and *it is entirely consistent* with the evidence that his attempt at concealment was made to protect himself or that he voluntarily took it upon himself to protect his brother-in-law.

The government seeks to sustain the ruling on the theory that Ison was a co-conspirator * * * But there is no evidence that the conspiracy continued beyond the time of seizure, and it is well settled that the declaration and conduct of a co-conspirator are binding only upon himself after the conspiracy has been abandoned or broken up * * * the judgment is reversed."

THE COURT BY ADMITTING THE TESTIMONY OF HELEN WALKUP COMMITTED GRAVE ERROR, WHICH PREJUDICED DEFENDANT MAYOLA, AND WHICH IS GROUNDS FOR REVERSAL.

These assignments of error are IV to X, transcript of record, pages 78-81, and are as follows:

"IV.

The District Court erred in admitting the following evidence over the objection and exception of defendant Mayola: in the course of the direct examination of the Government's witness Helen Walkup the witness testified that at one time, when Mr. Walkup returned from Mr. Mayola's residence, Mr. Walkup told her about a conversation between him and Mr. Mayola at which she was not present; thereupon the prosecutor put the following question to the witness: 'Q. What did Mr. Walkup say?' Counsel for defendant Mayola objected to the question upon the ground that the question called for hearsay. The Court overruled the objection and an exception was noted (Exception No. 5). The full substance of the evidence admitted over that objection and exception was as follows: 'A. He told me that Mr. Mayola said that it would be best if they carried their counterfeit bills on them, under their clothes, and that it would be better for Mr. Walkup to carry them, because Mr. (61) Mayola was a larger man and all that around his waist would make him look much larger than normal. I told Mr. Walkup that I thought he was being foolish in taking it at all.'

V.

The District Court erred in admitting the following evidence over the objection and exception

of defendant Mayola: in the course of the direct examination of the Government's witness Helen Walkup, the witness testified that Mr. Walkup was hard pressed financially and that he told her where he was getting money for the trip; thereupon the prosecutor put the following question to the witness: 'Q. What did he say?' Counsel for defendant Mayola objected to the question upon the ground that the question called for hearsay. The Court overruled the objection and an exception was noted (Exception No. 6). The full substance of the evidence admitted over that objection and exception was as follows: 'A. Two or three days before the day of sailing, Mr. Walkup told me that Mr. Mayola had agreed to give him $500.00 out of which Mr. Walkup stated that he was to give Mr. Armstrong some and the remainder was to finance Mr. Walkup's trip to take the bills down.'

VI.

The District Corut erred in admitting the following evidence over the objection and exception of defendant Mayola: in the course of the direct examination of the Government's witness Helen Walkup, the witness testified that she did not see the money belt made, in which the money was carried by Mr. Walkup, but that Mr. Walkup told her who made it; thereupon the prosecutor put the following question to the witness: 'Q. Whom did he say made it?' Counsel for defendant Mayola objected to the question upon the ground that the question called for hearsay. The Court overruled the objection and an exception was noted (Exception No. 7). The full substance of the evidence admitted over that objection and

exception was as follows: 'A. Mr. Walkup told me that Mrs. Mayola had made it.'

VII.

The District Court erred in admitting the following evidence over the objection and exception of defendant Mayola: during redirect examination of the Government's witness Helen Walkup, the prosecutor put to her the following question: 'Q. Between February, 1932, and April 9, the day of sailing for South America, did Mr. Walkup tell you anything about conversations with Mr. Mayola concerning counterfeit money?' Counsel for defendant Mayola objected to the question upon the ground that the question was leading and suggestive. The Court overruled the objection and an exception was noted (Exception No. 8). The full substance of the evidence admitted over that objection and exception was as follows: 'A. Around in March Mr. Walkup told me that Mr. Mayola might take him to South America with him to dispose of the money.'

VIII.

The District Court erred in admitting the following evidence over the objection and exception of defendant Mayola: during redirect examination of the Government's witness Helen Walkup, the prosecutor put to her the following question: 'Q. Did he [Mr. Walkup] mention names of other persons to be concerned with that counterfeit money?' Counsel for defendant Mayola objected to the question upon the ground that this conspiracy terminated after the money was made. The Court overuled the objection and an exception was noted (Exception No. 9). The full sub-

stance of the evidence admitted over that objection and exception was as follows: 'A. He said Mr. Mayola knew someone in South America who could handle it.'

IX.

The District Court erred in admitting the following evidence over the objection and exception of defendant Mayola: during redirect examination of the Government's witness Helen Walkup, the prosecutor put to her the following question: 'Q. Did he [Mr. Walkup] mention the name of that party in South America?' Counsel for defendant Mayola objected to the question upon the ground that the question called for hearsay. The Court overruled the objection and an exception was noted (Exception No. 10). The full substance of the evidence admitted over that objection and exception was as follows: 'A. He told me that Mr. Mayola introduced him to two men, Sisto Posso and Senior Ibanez, in South America, who wanted to handle the money if it was good.' "

As the Appellate Court said in *Hanfelt v. U. S.*, 53 F. (2nd) 811:

> *"This evidence was palpably hearsay.* The defendants were charged * * * with a conspiracy * * * Counsel for the government referring to this testimony says, 'It must be conceded that this was hearsay * * *' *The defendants under the Constitution were entitled to be confronted with the witnesses against them. (Amendment 6, Constitution.)* The *rule excluding hearsay is the broadest of all rules of evidence. Such evidence is not subject to the ordinary tests required by law for ascertaining the truth. The witnesses cannot*

be cross-examined in the presence of the court and jury, and, such testimony not being under the sanction of an oath, the witness could not be prosecuted for perjury, if his evidence were false. Neither is he subject to observation by the jury, as he would be if produced as a witness before them.

In Hopt v. People, 110 U. S. 574, 28 L. Ed. 262, in an opinion by Mr. Justice Harlan it is said: '* * * consequently his answer could only place before the jury the statement of someone not under oath, and *who, being absent, could not be subjected to the ordeal of cross-examination.* The question plainly called for *hearsay evidence,* which in its legal sense denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, *but rests, also in part, on the veracity and competency of some other person.'* 1 Greenl. Ev., sec. 99; 1 Phil. Ev. 169. The general rule, subject to certain well-established exceptions as old as the rule itself,—applicable in civil cases and *therefore to be rigidly enforced where life or liberty are at stake,*—was stated in Queen v. Hepburn, 7 Cranch. 295 (3 Law. ed. 348), to be *'that hearsay evidence is incompetent* to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge'. 'That this species of testimony,' the court further said, speaking by Chief Justice Marshall, 'supposed some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. *Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be*

practiced under its cover, combine to support the rule that hearsay evidence is inadmissible.'

The evidence so erroneously admitted tended to prove very material and essential allegations in the indictment, and we cannot say that its admission was without prejudice to the defendants * * *"

This language is vigorously followed in the case of *Hauger v. U. S.*, 173 F. 54, 56, in which the Court said:

"The first exception is based upon the admission of the testimony of John E. Washer a witness offered in behalf of the United States who gave in detail an alleged confession made to witness by one George Menear, being at the time confined in the said jail under arrest on the charge of passing counterfeit money." (Here follows a complete record of the testimony.)

"*The point is whether* under the circumstances the alleged *confession * * * was admissible as declarations of a co-conspirator * * ** In this case there was an *entire absence* of evidence to prove the *unlawful combination* between Menear and the defendant. *It is true that Menear stated to Washer, so Washer testified, that about the 1st of October, 1905, he Menear, and the defendant entered into an agreement or conspiracy to make and pass counterfeit coins. But as to that fact the declaration of Menear was only hearsay. There is no rule which renders the declarations of an alleged co-conspirator given second handed, admissible to prove the existence of the conspiracy.* Such declarations are made competent only after the conspiracy has been shown to exist. In this view

the alleged declarations of Menear are *clearly incompetent.* * * *

As we have said all of Washer's testimony detailing the alleged confession of Menear * * * *is only hearsay.* It is not necessary to refer to any rule or to cite authority in regard to the inadmissibility of hearsay testimony, but we will call attention to one leading case, Queen v. Hepburn, 11 U. S. 290, 3 L. Ed. 348. * * * Chief Justice Marshall says:

'That hearsay evidence is incompetent to establish and specific fact which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge.

It was very justly observed by a great judge that *"all questions upon the rules of evidence are of such importance to all orders and degrees of men: our lives, our liberty and our property are all concerned* in the support of those rules, which have matured by the wisdom of ages and are now revered for their antiquity and the good sense in which they are founded." *One of these rules is that "hearsay" evidence is in its own nature inadmissible'* * * *

So strictly have the Courts guarded and applied the rule that hearsay has been held incompetent even in the aid of human freedom * * *

Washer further stated that the remaining six alleged counterfeit coins he (Washer) had obtained from various persons * * * who told him (Washer) that they had received said alleged counterfeit dollars from the said George Menear previous to the date of his arrest * * * The testimony was clearly incompetent hearsay * * *

Reversed."

In this case we have Walkup, a confessed criminal, and who committed suicide after having made one confession the first one, absolving Mayola, another confession involving Mayola, and who thus by his own mouth convicted himself of being unable to tell the truth; brought out of his grave by the Government to testify through the mouth of his wife, as to a conversation which rivals the Arabian Nights, and all without the slightest opportunity of Mayola's counsel to cross-examine that dead conspirator who stalked continually before the jury with the approval of the judge. If this be the law, then where are the vaunted rights of the Constitution? But we submit this is not and cannot be the law.

This right of cross-examination of Walkup can well be set forth in a recent case in the Supreme Court, *Alford v. United States* (282 U. S. 687, 75 L. Ed. 624). The petitioner here was convicted of using the mails to defraud, in violation of Section 215 of the Criminal Code. At the trial a former employee of the petitioner testified against him. This testimony related in part to conversation between the witness and the petitioner when others were not present, as well as to statements of the petitioner to his salesmen, whom the witness did not identify.

On certiorari it was reversed in the Supreme Court in an opinion delivered by Mr. Justice Stone. The basis for the reversal and the extent of the right to cross-examine were then discussed in the following portions of the opinion:

> "Cross-examination of a witness is a matter of right. * * * Its permissible purposes, among

others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood * * * that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment * * * and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. * * *

The present case, after the witness for the prosecution had testified to uncorroborated conversations of the defendant of a damaging character, was a proper one for searching cross-examination. The question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed. * * *

But counsel for the defense went further, and in the ensuing colloquy with the court urged, as an additional reason why the question should be allowed, not a substitute reason, as the court below assumed, that he was informed that the witness was then in court in custody of the federal authorities, and that that fact could be brought out on cross-examination to show whatever bias or prejudice the witness might have. *The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity or under the coercive effect of his detention by officers of the*

United States, which was conducting the present prosecution. * * * Nor is it material, as the Court of Appeals said, whether the witness was in custody because of his participation in the transactions for which petitioner was indicted. Even if the witness were charged with some other offense by the prosecuting authorities, *petitioner was entitled to show by cross-examination that his testimony was affected by fear or favor growing out of his detention.* * * *"

Thus this Court allowed Helen Walkup, young, good looking, well dressed, the mother of two children, and far from looking the part of a conspirator, not in detention or arrest or under indictment, to pleasantly tell to the expectant jury a story told by her husband who could have been so easily discredited upon cross-examination. We have searched the records, and can find no case to support the learned judge in this ruling, but on the other hand we have found the following cases directly opposed to such evidence. We ask this Court to bear with us for we are pleading for a man whom we believe to be innocent, and whose conviction is a miscarriage of justice.

In the case of *Miller v. U. S.*, 133 F. 337, 351:

"For the same reasons these letters and clippings were not competent evidence that the defendants had any knowledge of any of the alleged facts stated in them * * * the statements in the letters and clippings are much less competent than hearsay. The suggestion that letters and clippings were properly received in evidence because they were a part of the things done by the defendants in execution of the alleged scheme

to defraud is not persuasive. It is only those acts in execution of the scheme which have some tendency to prove or disprove the charge that defendants conspired to devise or execute it that constitutes competent evidence upon the trial of the issue which that charge presents. * * * *The receipt of these letters and clippings* * * * *was prejudicial and fatal error* * * * this clipping from the newspaper was no evidence of the fact that he was ever president of that company. *It was nothing but hearsay of hearsay.*"

Again in

Lemon v. U. S., 164 F. 953, 959,

a letter was disallowed:

"In the investigation of the charges of fraud the latitude of inquiry is wider than is allowed in many cases. This is so because the intent of the parties is a mental condition and provable by a variety of acts, declarations, and facts which are often incompetent in the trial of other issues. *But this latitude of inquiry does not justify a disregard of the rules of competency or relevancy* * * * The case was a *criminal charge* * * * *not* a *civil suit.* * * * *This fact seems to have been lost sight of or to have been intentionally ignored.* The most important issue in the trial was whether the bank had been conducted honestly. * * * *The letter bore directly upon that issue but it was nothing but hearsay evidence.* * * * *The supposed Mr. Lastinger* (who is alleged to have written the letter) *was permitted to testify unsworn, and without cross-examination directly on the most vital issue in the case and defendants were deprived of their constitutional rights to be confronted with the witnesses against them. The let-*

ter was not only read to the jury with the stamp of the court's approval on it as competent and trustworthy evidence but the Court went further. * * * The error was a grave one and necessarily prejudicial. * * *"

It has been our good fortune to be able to present to this Court, cases which are so closely in point that there is no doubt but that they apply. Such a one is *Sykes v. U. S.*, 204 F. 900, 912, where the testimony of an accomplice, before the Court, uncorroborated, and contradicted by the witness, is condemned. How much worse is that same testimony given second hand by the wife of such an accomplice.

"The fact that the mail bag and the gunny sack were found where she said Sykes placed them, while it tended to show that this confessed criminal knew where the gunny sack was placed, had no more tendency to prove that Sykes put them there than it had to prove any member of the jury or any other innocent man did so. Wharton in the ninth edition of his work on Criminal Evidence in section 442 says: *'The corroboration requisite to validate the testimony of an alleged accomplice should be to the person of the accused. Any other corroboration would be delusive, since,* if corroboration in matters not connecting the accused with the offense were enough, *a party, who on the case against him,* would have no hope of escape, *could, by his mere oath, transfer to another the conviction hanging over himself'* * * *

* * * all her statements tending in any way to show Sykes' connection * * * *are* CONTRADICTED *by them. She contradicted her own testimony.* * * * *One of these statements is false.* * * *Strike down*

Mrs. Callahan's testimony and there is nothing to connect him with it. * * *

'It is undoubtedly the better practice', says the Supreme Court, 'for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them.' Holmgren v. U. S., 217 U. S. 509, 523, 524, 54 L. Ed. 861. And the conclusion is that the *uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case had turned to glad fruition, that another was an instigator or a participant in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt but that it presents no substantial evidence of it.* Jahnke v. State, 68 Neb. 154, 104 N. W. 154, 158. * * *"

Another case which is very similar to the instant case is *Kirkwood v. U. S.,* 256 F. 825, where it was said:

"We think that in the conviction of Denison there was a *clear miscarriage of justice,* that considering the *character* and the *source* of evidence against him *and its value* in relation to all that was received at the trial, *it should reasonably be said* that there was *no substantial proof* of his guilt.

Denison employed the agency for which Kirkwood worked, but there *was no evidence whatever, except* as presently mentioned, that he otherwise employed Kirkwood or paid him for his services, or expenses, nor evidence that he directed him in

his dealings with the postoffice clerk at Harrisonville *or authorized or knew* of any unlawful tampering with the mails. * * * *The sole adverse proof was the testimony of a detective in Chicago and his stenographer* that in a subsequent conversation in that city Denison admitted connection with the opening of the letters. *The stenographer fully discredited herself* and we put her testimony aside without further mention. *The credibility of the Chicago detective was impeached* by evidence * * * that he gave *false testimony* * * * and made *false statements* * * * and that his *reputation* for *truth and veracity where he lived was bad.*

A thorough examination of the proceedings at the trial has convinced us that the *conviction of Denison was due in no small measure to the latitude allowed counsel for the government in the examination of witnesses, and the emphasis put upon relatively unimportant matters.* * * *"

In this case, counsel for Mayola had no opportunity to impeach Walkup's statements, by showing that he had made false statements, other than the bringing in a first confession just after his arrest, when he was most likely to have told the truth, before the hope of advancing his own cause at the expense of Mayola suggested itself to his mind. Neither could we attempt to show that his reputation for truth, honesty and veraciy in the community was bad, for he was a dead man. It must be admitted that he told contradictory stories. After some difficulty had been experienced by counsel in obtaining the same from the government (Tr. of Record p. 29) the answer of Walkup is brought to light (in italics):

"Mr. Tramutolo. I now ask that the Government furnish me, if they will, with the original affidavit of Mr. Herbert Walkup, dated June 30, 1932.

Thereupon, Mr. Van Der Zee stated that he did not have the document, but they would cause a search to be made for it; he said that he did have a statement made by Herbert Walkup on July 1, 1932, if counsel wished to use it. Mr. Tramutolo replied that he did not want that one, but wanted the one of June 30, 1932.

Mr. Van Der Zee. If it is the purpose of counsel to show what Mr. Walkup stated with regard to this transaction, here is the statement dated July 1, 1932, and he is welcome to use it.

Mr. Tramutolo. I am asking for the specific statement made on June 30, 1932.

(After recess.) Mr. Van Der Zee stated that he had had a search made by Secret Service Agent Jarrell, and was prepared to offer every statement that Mr. Walkup made for such disposition as the court thought proper. Mr. Tramutolo replied that he was requesting one particular statement, specifically the one of June 30, 1932.

Thereupon, Mr. Van Der Zee recalled Mr. JARRELL as a witness, who testified that Herbert Walkup made two statements, one on June 30, 1932, and the second one on July 1, 1932. Both of those statements were introduced at the hearing on the extradition of defendant Campbell, at which hearing I was present. The statements were not read at the hearing.

Mr. Tramutolo. I ask to read that portion, your Honor.

The Court. Very well, read it.

Mr. Van Der Zee. We object to counsel reading a portion of this statement unless we are permitted to introduce the entire statement, and any other statements used, by Mr. Walkup, in this hearing.

The Court. I will not say about that. You may indicate to the jury what it is you are reading from.

Mr. Tramutolo. Gentlemen, this is a statement taken of Mr. Herbert L. Walkup, San Francisco, on June 30, 1932—without reading all the preliminaries, I will get to the question that I think is pertinent and the one that I want to introduce into the record, it starts with asking his age, then, after being asked several other questions, this question was asked him:

'Q. *What does Mr. Mayola know about it?*

A. *I don't think the man knows anything about the counterfeit money. I am not trying to protect the man but the man honestly was talking about mines—got power of attorney for a mine while in Panama, talked mine to two other people I know of while there. I know Mayola has promoted some big mine companies in Colombia —the Colombia Gold and Platinum Company'.*"

Thus the real truth came from the lips of this confessed criminal prior to the time fear set in, which fear drove him to involve Mayola to save himself, and failing to extract a promise of immunity on the basis of this treachery, like Judas of old, he committed suicide.

Thus as is said in the case of *Stager v. U. S.*, 233 F. 510, 513:

"A conspiracy could be proved by the mere letter of one man that another was implicated."

The Court therein said:

"When a conspiracy is once established, acts and admissions of anyone of the conspirators in pursuance of the conspiracy and while it continues are admissible against the others, upon the theory that the conspirators are agents of one another in the common enterprise. But the preliminary question whether sufficient evidence of a conspiracy has been adduced must always be answered by the Court in the affirmative or the general rule of evidence excluding hearsay will render an admission of one of the conspirators inadmissible against the others.

Inasmuch as we do not think the existence of a conspiracy was established these letters were wholly incompetent and inadmissible against Stager. *But even if there had been sufficient evidence of a conspiracy we find nothing tending to establish that any conspiracy was entered into* * * * on the 29th day of December, 1911.

This letter contained the following statement: 'of course the $200. to Stager are well placed and *we shall have* to give him ore at the end of the year if he continues to keep us informed properly'.

We can find no warrant for the admission of this letter *written at a time covered by no other or prior evidence showing the formation of a conspiracy other than the letter itself. If such a letter is competent, a conspiracy could be proved by the mere letter of one man that another was implicated. The very object of the rule against hearsay was to prevent a jury from*

being influenced by statements of persons who could not be subjected to cross-examination. Reversed."

Not only this, but such a statement must be made in furtherance of its object. The statements made by Walkup consisted of a narrative by a husband to his wife, in which she testified she did not even have any corroboration, for she did not see or hear of her own eyes and ears, any of the facts stated. The Courts all hold that statements must be in furtherance of its object. In the case of *Tofanelli v. U. S.,* 28 F. (2) 581, it was held:

"These statements based on hearsay and neighborhood gossip were in our opinion utterly insufficient to warrant the submission of the case to the jury or to support a verdict finding that the defendants had conspired to deposit stolen ore in the United States Mint. * * *

The test whether the *statement or declaration* of one conspirator is admissible against others *does not depend entirely upon whether the statement was made during the existence of the conspiracy.* The statement or declaration must not only have been made during the continuance of the conspiracy *but it must likewise have been made in furtherance of its object. This element was entirely overlooked by the court below."*

This element of the furtherance of the conspiracy as a necessary condition precedent to the allowance of such testimony is strongly endorsed in *Clark v. U. S.,* 61 F. (2) 409 where it was said:

"Error is assigned to the admission in evidence over objection, of the testimony of two witnesses,

as follows: C. C. Stewart testified, in substance, that Thomas told him that Haymans told him (Thomas) that the sheriff had issued a warning * * *

C. K. Haymans testified * * * *that later Thomas told the witness that the sheriff came to Haymans' place to tell him that Bergstrom (a prohibition officer) was there and to be careful.*

It appears that Stewart and Thomas were the principal conspirators. Stewart had been granted immunity * * * was the principal witness against appellant. * * * *Appellant took the stand in his own behalf and denied that he had ever made any agreement with Stewart or any one else to engage in the conspiracy, denied that he had received any money from Stewart, and denied that he had given him any aid whatever.*

One of the means by which the conspiracy was to be effective was for appellant to warn the conspirator from time to time. There is no evidence in the record to sustain this allegation except the two hearsay statements, admitted over objections above noted. * * *

As the statements were made by Thomas in August it is possible the conspiracy had been abandoned. *At any rate they were merely a narrative of past events. And clearly they were not made by Thomas in furtherance of the conspiracy, and were not part of the res gestae of any overt act.* It would be *extending the rule to unreasonable limits to permit these statements made by a co-conspirator not on trial, to be admitted.* There are decisions which would seem to support a contrary conclusion, but upon close analysis, they fall short of doing so. The conclusion we

reach is supported by the well-considered opinion of Judge Hand in Van Riper v. U. S. * * * Considering the *conflicting evidence before the jury,* we cannot say that the testimony improperly admitted, was harmless. These errors require a reversal of the judgment."

The same rule is again stressed in

Romeo v. U. S., 23 F. (2) 551, 553,

where the Court said:

"The major part of the testimony of Agent Whitney related to reports made to him from time to time by defendant Rossi giving information as to the personnel of the conspiracy *and narrating what they had done in the past and what they proposed to do in the future. Rossi was not on trial* and it will be conceded perhaps that statements made by him were incompetent as against other defendants, unless made in their presence, or unless made in furtherance of the conspiracy. It is not contended that the statements were made in the presence of any of the other defendants *nor can it be successfully contended that they were made in furtherance of the objects of the conspiracy.* Indeed that necessary effect of the reports was to bring the conspiracy to an end, rather than to further its objects. *Nor does such a narration of fact come within even the broadest conception of the res gestae rule.* For these reasons that part of the testimony should have been excluded if timely objection had been made."

And now we present for the consideration a case which we submit is on all fours with the present case. The case of *Brown v. U. S.,* 298 F. 428, 429, held:

*"Another incident * * * unusual * * * and immaterial, is that the general outline of the scheme if not in detail was conceived in the brain of one Elsworth who died before indictment found. This man was plainly the leader.* * * *

After the decease of Ellsworth certain papers were found on his desk and in his handwriting. They were apparently memorandum suggestive of intended talks with various of his subordinates particularly Atkins. * * * There was no evidence that Atkins had taken any part in the making of this memorandum or that he had ever seen it—something which he himself denies. But the piece of paper was introduced in evidence. * * *

It is, of course, true that any act or declaration of any conspirator, done or said in furtherance of the conspiracy, during the progress thereof and before it terminates is evidence against all conspirators. *But this law does not mean that the rules of evidence are disposed with in proving the act or declaration which is to be evidence against all.*

To permit this piece of paper to go into evidence simply because it was in Ellsworth's handwriting was like calling Ellsworth from his grave. * * *"

To permit Helen Walkup to thus get her husband's testimony into evidence, was like calling Walkup from his grave.

This has the approval of the judge for he mentions it in his instruction (Tr. of Record pp. 70-71), where he instructed the jury:

> "This rule also applies in a case where one of the alleged conspirators had died since making such statements and because of such death is not made a defendant upon the trial of the other conspirators."

In conclusion of this phase of this particular assignment of errors, it has been held that where, as here, the prosecuting attorney persists in putting in testimony which was erroneous, the error is fatal if the testimony was or might have been prejudicial, and the burden does not rest upon the defendant Mayola to show affirmatively that it was prejudicial. In the case of *Alkon v. U. S.,* 163 F. 810, 814, this is set forth clearly:

> "We are met by the claim that there is nothing here to show that this cross-examination was prejudicial and * * * as *to this the burden rests on the plaintiff in error to show affirmatively that it was. This is not the rule in the federal courts. The rule there, is that when a party persists in putting in testimony which was objected to and which was erroneous, the error is fatal if the testimony was or might have been prejudicial.* Colombia Railroad Co. v. Hawthorne, 144 U. S. 202, 207, 208, 36 L. Ed. 405. * * * The judgment and verdict are set aside."

HELEN WALKUP WAS INCOMPETENT TO TESTIFY IF HER HUSBAND WAS ALIVE, IN ANY WAY WHICH MIGHT INCRIMINATE HIM. HER TESTIMONY WAS INCRIMINATING IN THE EXTREME. ALTHOUGH HE WAS DEAD, HE WAS A CONSPIRATOR, AND WAS SO CONSIDERED BY THE COURT WHICH ALLOWED HIM TO STALK HIS WAY THROUGHOUT THE WHOLE PROCEEDINGS. FOR THIS ERROR WHICH IS COVERED UNDER INCOMPETENCY THE CASE SHOULD BE REVERSED AS AGAINST MAYOLA.

In the first place, we wish to point out that if the government so wished, they could have indicted Mrs. Walkup along with her husband. No doubt she was well aware of such a state of affairs when she so willingly testified for the government. In the case of *Dawson v. U. S.,* 10 F. (2) 106, this is set out:

> "In 12 C. J. 543 it is said: 'It has been uniformly held that as husband and wife are considered one in law they cannot be guilty of conspiracy * * * But where there is another conspirator a wife may be joined with her husband in the indictment.' "

The case of *Moy v. U. S.,* 254 U. S. 189, 65 L. Ed. 214, is controlling:

> "But a single point remains—hardly requiring mention—the refusal to permit defendant's wife to testify in his behalf. It is conceded that she was not a competent witness for all purposes, a wife's evidence not having been admissible at the first Judicature Act, and the relaxation of the rule * * * being confined to civil cases * * * *But it is said, the general rule does not apply to exclude the wife's evidence in the present case* because she was offered not 'in behalf of her husband', that is not to prove his innocence, but simply to contradict the testimony of particular wit-

nesses for the government who had testified to certain matters as having transferred in her presence. *The distinction is without substance. The rule that excluded a wife from testifying for her husband is based upon her interest in the event, and applies irrespective of the kind of testimony she might give* * * *"

Again in *U. S. v. Knoell,* 230 F. 509, 512:

"The second question discussed is whether Rose Turetz, the wife of one of the conspirators was a competent witness * * *

The test is: Does her testimony incriminate him, either directly or by necessary implication."

IT WAS GRAVE ERROR FOR THE COURT TO ADMIT A SUBSEQUENT CONFESSION OF WALKUP, AFTER HIS ARREST, WHEN IT IS SETTLED LAW THAT BOTH SUCH CONFESSIONS COULD ONLY BE USED AGAINST HIMSELF, AND HE WAS DEAD, AND MAYOLA WAS FORCED TO DO THE BEST HE COULD TO CROSS-EXAMINE A DEAD MAN BY SHOWING THAT THAT SAME DEAD MAN HAD ON A SUBSEQUENT DATE FREELY ABSOLVED HIM OF ANY CONNECTION WITH THE CONSPIRACY.

In assignment of error X, transcript of record, page 81:

"The District Court erred in admitting the following evidence over the objection and exception of defendant Mayola: on redirect examination of the Government's witness Jarrell, the prosecutor had the witness identify two written statements (one dated June 30, 1932, and the other dated July 1, 1932), as having been signed by Mr. Walkup and as having been used by the Government in evidence before a magistrate in British

> Columbia in the proceeding for the extradition of the defendant Campbell; and thereupon the prosecutor offered both statements in evidence, to which offer counsel for defendant Mayola objected as not being proper cross-examination and that the offer contained incompetent evidence. The Court overruled the objection and received both statements as one exhibit, U. S. Exhibit No. 8 and an exception was noted (Exception No. 11). The said exhibit is many pages long, and has been sent up under Rule 14."

The incompetency of the above evidence is pointed out in *Graham v. U. S.*, 15 F. (2) 740, which case clearly expresses the settled law.

> "the confessions were made by Graham and Ofallon on the day folowing their arrest after they had been in jail all night and not in the presence of the other defendants. The court did not at any stage instruct the jury that they constituted evidence only against the defendants making them. In this we think it erred.
>
> "In Morrow v. U. S., 11 F. (2nd) 259, this Court said: 'The act of one conspirator in the prosecution of the enterprise and carrying out the purpose thereof is evidence against all conspirators * * * *yet such act must be as the Supreme Court* says in Brown v. U. S., 150 U. S. 93, 98 (37 L. Ed. 1010), *'done and made while the conspiracy is pending and in furtherance of its object.'* Admissions or acts of a conspirator after the conspiracy has terminated are not admissible against a former conspirator nor are the acts of a person committed prior to the formation of the conspiracy admissible against his subsequent co-conspirator. The declarations or acts of one con-

spirator are admissible as against a co-conspirator if occurring during the pendency of the conspiracy and in furtherance of its object.

Justice Harlan in Sparf v. U. S., 156 U. S. 51, 39 L. Ed. 343, says * * * the rule is well settled that 'after the conspiracy has come to an end, and whether by success or failure, *the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the other'* * * *

As a general rule *the arrest of co-conspirators may be said to effectively* preclude any further concerted action and ordinarily *puts an end to the conspiracy.* Hauger v. U. S., 173 F. 54; Sorenson v. U. S., 168 F. 785."

There can be no doubt but that this admission was a grave error and prejudicial to Mayola.

THE COURT ERRED IN THE FOLLOWING INSTRUCTION WITHOUT QUALIFICATION. (Tr. of Record p. 72.)

"The formation or existence of a conspiracy may be shown either by direct and positive evidence, or by circumstantial evidence. *The law does not require the Government to lay its finger on the precise method or manner in which the conspiracy of the kind here alleged was entered into, for in ninety-nine cases out of a hundred it would be impossible for the Government to make such proof. The fact of a conspiracy, therefore, must always be established by evidence more or less circumstantial."*

The above is not a correct statement of the law. Conspiracy may be proven by circumstantial evidence,

but when such evidence is relied upon solely, or even in part, to convict, the circumstances must distinctly indicate the guilt beyond a reasonable doubt.

> "Where *that proof is in whole or in part circumstantial * * * the circumstances * * * must so distinctly indicate the guilt * * * as to leave no reasonable explanation * * * which is consistent with * * * innocence.* U. S. v. Lancaster, 44 F. 894, 896," cited in *Terry v. U. S.* supra.

It is also true that where circumstantial evidence is relied upon as here to convict, then all inferences and presumptions must be critically scanned by this Court so that no miscarriage of justice results from suspicion, or presumption upon presumption, always keeping in mind that the entire case must be proved beyond a reasonable doubt.

Thus mere suspicion coupled with the fact that defendant knew of the conspiracy was held in *Marrasch v. U. S.,* 168 F. 225, 231, not to be enough:

> "We are unable to find sufficient evidence to sustain the verdict against Marrasch. *There are some suspicious circumstances and facts which seem to indicate he had knowledge* of the illegal nature of the transaction. *But there is nothing which rises to the dignity of proof required in criminal cases. Knowledge* by an alleged co-conspirator that the other defendants were attempting to defraud the United States *is not enough. Mere suspicion* that he was a party to the conspiracy *is not enough.*"

Thus the circumstances have been required to be of a much more positive and efficient character to con-

nect the defendant with the conspiracy. In *Roukous v. U. S.,* 195 F. 353, 360, the Court goes on to say:

> "The record fails to disclose anything which is not as consistent with his innocence as with his guilt unless it be the matter of his denying the meeting * * * which at least is only of small significance and wholly insufficient unless connected with other *circumstances of much more positive and efficient character* to connect Adams under any rules which have ever been stated with reference to proving each of several circumstances beyond a reasonable doubt when the case is undertaken to be sustained by circumstantial evidence.
>
> Therefore, remembering that while it is not necessary that any particular circumstance should of itself be sufficient to prove a criminal case beyond a reasonable doubt, *yet it is necessary that each circumstance offered as a part of the combination of proofs should itself be maintained beyond a reasonable doubt, and should have the efficiency* so far as it has efficiency to a greater or less range, *beyond a reasonable doubt and at least be free from the condition of being as consistent with innocence as with guilt.* * * * Consequently the judgment must be reversed as to Adams."

Thus this case adds another fact which must exist, that is the circumstances must be free from being as consistent with innocence as with guilt. Mayola's entire actions were without doubt as consistent with innocence as with guilt. Again the Court holds that the circumstances must be convincing, and not meager, and cannot wholly rest upon inference and conjecture or moral probability.

Wolf v. U. S., 238 F. 902, 904:

"So far as he is concerned the evidence is *not only unconvincing but exceedingly meager* * * * the case against Sam Wolf appears *to rest wholly upon inference and conjecture.* * * * In other words the circumstance of which so much is sought to be made is fully consistent with honest purpose; it is absurdly inconsistent with criminal intent. * * * True he was the nominal head of the concern * * * and had opportunity doubtless to find out that a considerable part of the stock had disappeared. But *moral probability however shown cannot take the place of legal evidence,* and inferences which the jury may draw in a case like this *must be based upon facts which of themselves tend to establish the guilt of the accused.*

In the face of a situation like this where suspicion is almost instinctive, we are liable to forget the nature and degree of that protection which the law affords by the presumption of innocence. It may therefore be profitable to recall the forceful words of Mr. Justice (now Chief Justice) White in Coffin v. U. S., 156 U. S. 458, 39 L. Ed. 481:

> *'Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen by nature whereof, when brought to trial upon a criminal charge, he must be acquitted unless he is proven guilty.* In other words the presumption is an *instrument of proof created by the law* in favor of one accused whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.'

The 'proof created by the law' is not overcome by evidence merely of facts which are not plainly

inconsistent with innocence. To hold otherwise is to assume, as the government contends, that because Sam Wolf came to the store now and then, *he not only might have known, and ought to have known, but he must have known what his brother was doing. In our opinion the latter assumption is clearly unwarranted and it therefore results that the verdict against him rests upon plausible conjecture and not upon proof of incriminating facts. It may be true * * * that Sam Wolf is the chief culprit * * * that his appearance on the witness stand and manner of testifying induced the belief that he was undoubtedly guilty.* But this is simply begging the question, since it is plain that *opinion based upon probability is wholly insufficient to overcome the legal presumption and equally plain that a defendant is not to be convicted because the jury thinks that he looks like a criminal.* * * * Reversed."

Another way of expressing it, is that if the circumstances are capable of raising two inferences, one innocent, and one guilty, Mayola must be given the benefit of the innocent inference. This was laid down as the rule in *Enziger v. U. S.,* 276 F. 905, 907:

"In all human likelihood a sale was involved somewhere in the transaction. Yet a lawful conviction for conspiracy to effect a sale cannot be had except on evidence. No evidence of sale was disclosed in the record. The nearest approach to it was the *statement made by the witness Brown that Enziger's purpose in seeking the secretary was to pay for the liquor. It may have been. Yet this was only Brown's conclusion* of Enziger's purpose and was *nothing more than an inference from the testimony which was equally capable of*

> *raising an inference that the defendants were merely transporting liquor.* Evidence of a sale cannot be gathered from the fact of transportation alone."

Neither can the conclusions be questionable, or the result of carelessness, which at most creates suspicion. In *Weiner v. U. S.,* 282 F. 799, 800:

> "All the facts alleged may be true *but the proof is meager, and the conclusions* to be drawn therefrom *questionable* * * *
>
> That Weiner placed the bag containing the opium in the hall in his home and that his son Sam informed Baker that the bag contained opium may be a part of the plan to carry out a conspiracy. *On the other hand they may be simple acts of carelessness such as people innocent of any wrongdoing are constantly committing* * * *
>
> All the facts established by the evidence are in themselves lawful. *At most they create suspicion only.* They are not incompatible with innocence and do not exclude any other hypothesis than that of guilt. Reversed."

The presence of defendant Mayola for a short time in the Walkup house, or his presence in the same stateroom without showing that he did or said anything either in the formation of the conspiracy or in its furtherance, cannot be sufficient to sustain this conviction. It was so held in *Brauer v. U. S.,* 299 F. 10, 14:

> "As to Boldt the *only testimony* implicating him in the alleged conspiracy * * * *was his presence there from time to time in a garage* where it is alleged the defendants made distilled

> spirits. *There is nothing to show that he said or did anything either in formation of the conspiracy or in its furtherance.* His presence there may or may not have been in the line of his duty. *However that may be, it alone is not enough to sustain the inference of guilt."*

These statements of law are strongly endorsed in the case of *Turinetti v. U. S.*, 2 F. (2) 15, 16, where it was said:

> "We are further of the view that there was not sufficient evidence to take the case to the jury as to Azzolin. *He may be guilty, the fact and circumstances adduced arouse a suspicion of guilt, but mere suspicion is not a sufficient ground on which to convict a man of any criminal offense* * * *
>
> All of these facts together do not make out a case against Azzolin. *His knowledge even that the still was in Turinetti's apartment would not render him guilty under the charge here* * * * Whenever a circumstance, relied on as evidence of criminal guilt, is susceptible of two inferences one of which is in favor of innocence, such circumstance is robbed of all probative value, *even though from the other inference guilt is fairly deducible."*

Even assuming, for the purpose of argument, that Mayola knew that Walkup was making counterfeit money, which he denied upon the stand, the above language holds that such knowledge does not *ipso facto* make him guilty of conspiracy. In *Edwards v. U. S.*, 7 F. (2) 357, 360 it was held that the Court must be satisfied as to the guilt of defendant:

"There are suspicious circumstances appearing in the record * * *

From a careful consideration of this record *we are not satisfied as to the guilt* of the defendant. *We are satisfied,* however, *that all of the circumstances* taken together as disclosed by the record *are as consistent with innocence as with guilt.* Consequently the government did not prove a case of guilt beyond a reasonable doubt. The evidence was insufficient to support the verdict."

The *corpus delicti*—in this case the agreement to conspire and the overt act—must be proven and cannot be presumed. This is brought out clearly in *Wagner v. U. S.,* 8 F. (2) 581, 586:

"It is elementary that the *corpus delicti*—in this case the possession of the strip stamps—*must be proven and cannot be presumed.* It may be proven however by circumstantial evidence. The fact relied upon to prove the possession is the statement of defendant he wanted his liquor back. The argument is that it must be presumed that the liquor referred * * * was the liquor which had been seized * * * That being presumed, it must next be presumed that defendant owned the liquor; the next step is the presumption that he had possession of the liquor; the next step is the presumption that he possessed a trunk in which the liquor was found, and the contents thereof including the counterfeit strip stamps. By this course of reasoning the conclusion is sought to be drawn that defendant had possession of the counterfeit strip stamps with intent to defraud * * * We think the course of reasoning is faulty. *It is well established that the basis of a presumption must be a fact, and that one pre-*

sumption cannot be the basis of another presumption. (Citing cases.)"

Thus acquaintance linked with suspicious circumstances has been held to be insufficient. In *Coleman v. U. S.*, 11 F. (2) 601:

"Coleman was a resident of Cincinnati. He had formerly lived at Owenton * * * At Owenton local officers found in the office of a livery stable under a stairway 42 bottles of whiskey which had been brought to Owenton and stored in the office by Harcourt. The evidence against Coleman was that he was seen cranking a Ford car that had stalled in front of the stable, and presumably had been used for bringing the whiskey to Owenton; earlier in the day he had asked an employee of another livery stable in Owenton to store some glassware; he signed Harcourt's bond * * * and was seen during the day with Hammond, another defendant, who was convicted.

It appeared that Coleman had started from Cincinnati for Owenton with some members of his family in a Ford car the day before as he says for the purpose of seeing others of his family who resided at the latter place * * * *These facts with such inferences as may be drawn from his acquaintance with Harcourt constituted the evidence upon which the conviction was based. In our opinion it was not sufficient to submit the case to the jury. Reversed."*

And again in *Chin Wah v. U. S.*, 13 F. (2) 530, 532, the Court held:

"On the other hand though Look Hoo's part is suspicious, we are disposed to think that the

case breaks down as to him. It appears to us *nearly as likely that he had no part in the conspiracy as that he did.*"

In *Niederluecke v. U. S.,* 21 F. (2) 511, it was held: "But these *presumptions are too violent and irrational to sustain a conviction of a serious offense,* and the permissible basis of a presumption must be a fact, and one presumption may not be the basis of another presumption."

Again, circumstances tending to rouse grave suspicion are held to be insufficient to convict of crime. In *Gerson v. U. S.,* 25 Fed. 2nd 49, 56, it was said:

"Proof of a definite plan or formal agreement between conspirators can seldom be shown by direct evidence. Such proof is not necessary. In fact, conspiracy is generally shown by circumstantial evidence * * *. *The burden of proof was upon the government to show facts and circumstances* in the proof of the alleged conspiracy *which excluded every other hypothesis than that of guilt.* In a recent case, Van Gorder v. U. S. 21 F. (2) 939, 942, this Court said:

> *'In order to sustain conviction of a crime on circumstantial evidence it must be such as to exclude every reasonable hypothesis but that of the guilt of the accused. The facts proved, must all be consistent with and point to his guilt only and inconsistent with his innocence'* * * *

mere suspicion is not sufficient on which to base a conviction. * * * As far as the record goes, therefore there is no evidence to show a conspiracy to buy large quantities of merchandise as charged. * * * It is no answer to this to say

that probably the indebtedness shown was for merchandise. *This may be so, but this is a criminal case, where men's liberty is at stake, and while natural inferences can be drawn from circumstances, such inferences cannot be substituted for circumstances. That the case is full of circumstances more or less suspicious may be conceded.* The failure to keep books, the securing of $50. bills, and the carrying of some of them by Ike Gerson in his shoes, the bank account in the name of Clara Gerson by Phillip Gerson, the various bank accounts in different places during the time of sales, the moving of stock of goods from one place to another, the manner of buying the automobile and giving the chattel mortgage thereon, the relationship of the parties * * * are *circumstances tending to rouse grave suspicion as to the entire transaction. But suspicion is not sufficient to convict of crime.*

A calm, candid and careful consideration of the record in this case (whatever may be the inferences arise in the mind from the numerous complicated and suspicious circumstances and the relationship of the parties) *must we think convince * * * that the government failed to prove conspiracy as charged. * * * The circumstances shown are not such as to exclude every reasonable hypothesis but that of the guilt of the accused, nor are they less compatible with innocence than with guilt. Reversed.''*

Where the explanation by Mayola of the suspicious circumstances is entirely consistent with innocence the conviction should be reversed. This was held to be law in *Tinsley v. U. S.,* 43 F. (2) 890, 893, where it was said:

"Even though no motion was made by Tinsley for an instructed verdict, as the evidence was insufficient to sustain the conspiracy count we are compelled to hold that his conviction on that count cannot stand. * * *

While the evidence of Reed's *conversation with Kelly unexplained gives rise to some suspicion, his explanation of it is entirely consistent with innocence.* * * * The evidence in this record as to Reed with the addition of the proffered testimony of Mrs. Tinsley is as consistent with innocence as with guilt, *and even without the explanation* of the Kelly transaction by Mrs. Tinsley *we should doubt if the evidence is sufficient.* It is a well established rule of this court that if the *evidence in a criminal case as a whole is as consistent with innocence as with guilt, conviction should not be sustained.*"

This was followed in *Graceffo v. U. S.,* 46 F. (2) 852:

"The only evidence against him (Graceffo) was his mere presence on the premises at this particular time. No one ever saw him there before and no incriminating evidence was found on him or in his possession. In explanation to the officers how he happened to be there, Graceffo said he came to Reading the night before and went to the distillery to see one of the defendants. This testimony stands without contradiction or impeachment.

The evidence is insufficient to sustain the judgment. There must ordinarily be something more than the mere presence of a person at a distillery at a particular time to justify an inference of guilt. *If any substantial evidence existed* * * *

*it is reasonable to infer that the prohibition agents would have produced it. But none was produced and we are left to suspicion only. The evidence * * * in connection with his explanation is as consistent with innocence as with guilt. It has been held by a long line of decisions that unless there is substantial evidence of facts which exclude every other hypothesis than guilt * * * and where all the evidence is as consistent with innocence as with guilt, it is the duty * * * of the appellate court to reverse. * * *"*

A well considered case and one in which the circumstances can be well said to be very much like the instant case, is *Dahly v. U. S.*, 50 F. 2nd, 37, 42:

"The gist of the offense is conspiracy, that is the agreement. * * *

The overt act must be one independent of the conspiracy or agreement. It must not be one of a series of acts constituting the agreement or conspiracy together. It must be a subsequent independent act following the complete agreement or conspiracy and done to carry into effect the object of the conspiracy. * * *

*Proof of the overt acts may or may not be sufficient to prove the conspiracy. This will depend upon * * * whether they are of such a character separately or collectively that they are clearly referable to a preagreement or conspiracy of the actors.* * * *

Circumstantial evidence is equally available with direct evidence to prove the conspiracy, *but suspicion, or conjecture cannot take the place of evidence.* Guilt must be established beyond a reasonable doubt, and, where the evidence is con-

sistent with innocence as with guilt no conviction can properly be had. *Even participation in the offense which is the object of the conspiracy does not necessarily prove the participant guilty of conspiracy. The evidence must convince that the defendant did something other than participate in the offense which is the object of the conspiracy. There must in addition thereto be proof of the unlawful agreement, and participation therein with knowledge of the agreement.*

Presumption cannot be based upon another presumption, but only upon facts. * * *

There may be a subsequent joining, but a person to be held as subsequently joining a conspiracy must be shown to have *had knowledge of the conspiracy at the time of joining and to have participated while having such knowledge.* * * *

The three men * * * were government officials. * * * *There was nothing unusual or suspicious that they should call upon each other if they were in the same city. Here again it requires a piling of presumption upon presumption to connect the St. Paul meeting with the conspiracy charged.* * * * Our conclusion is that the evidence by which it is sought to connect Beaton with the conspiracy charged, *even if a conspiracy existed, cannot be considered as substantial, at most it amounts to a slender suspicion.*

The evidence * * * against Dahly * * * *is also entirely circumstantial.* The matters relied upon by the government are the alleged introduction by Dahly of Smith to Hoban, the statement of Dahly therewith, the trip to Washington by Hoban and the telegram sent by him to Dahly, the meeting of Dahly Beaton and Hoban at

St. Paul, the trip by Dahly to California and the use by him of an assumed name in connection therewith; the letter written by Dahly from California to Hoban. * * *

It must be conceded that *if full credence is given* to the testimony of Smith, these matters *at least form suspicious circumstances. Whether such evidence should be given credence* * * * *may be open to grave doubt.* * * * *Without intrenching upon the general rule that Appellate Courts will not usually weigh the evidence, yet on account of the foregoing considerations and in view of the exceptional facts of this case,* we are of the opinion that the testimony of Smith * * * *cannot be held to be substantial* in any true sense of that word, 17 C. J. Secs. 3594-3596. * * *

But even giving full credence to his testimony, yet the suspicious circumstances thus raised, fall far short of being substantial evidence of the conspiracy charged and of Dahly's connection therewith. * * *

As to the trip to Washington there is no direct evidence that this was made at the direction of Dahly. * * * Prior to this time Hoban had expressed an intention of going to Washington. * * * *It seems quite as probable therefore that Hoban made the trip for his own purpose and conceived the idea of making Smith pay him money under the belief that the trip was in his behalf.*

Whatever may be thought of the acts of Hoban, *the case against the two appellants on the charge of conspiracy appears to us to consist almost entirely of conjecture, suspicion, presump-*

tion and misinterpretation of acts and statements of the two appellants. The evidence shows that up to the time of this charge against them, Beaton and Dahly had both borne excellent reputations in the community in which they lived. Reversed."

In *Booth v. U. S.*, 57 F. 2nd 192, 200, in a dissenting opinion (Lewis, J. dissenting):

"*Where an incriminating fact is sought to be established by circumstantial proof,* that proof to be sufficient for the intended purpose *must exclude every other reasonable hypothesis than that of the existence of the incriminating fact.* I think there was no such proof in this case. There is another established principle in criminal law—when *two inferences are each reasonably deducible from proof one against a defendant and the other in his favor, the latter must be accepted.* * * *"

The real reason why the circumstantial evidence against Mayola must be critically and carefully scrutinized is best set forth in the following case.

Sullivan v. U. S., 283 F. 865, 867:

"But it was essential to Sullivan's lawful conviction that there should be *proof beyond a reasonable doubt that he knowingly and unlawfully* used the Harrison form to procure and that by means thereof he did procure the express package of drugs. *The burden was upon the government to make the proof. There was a legal presumption that Sullivan was innocent of this charge until he was proven to be guilty thereof beyond a reasonable doubt. There was no direct evidence.* * * * *All of the evidence* * * * *was circumstantial.* * * * There *was no substantial* evi-

dence to sustain the verdict. * * * When the record is *carefully read and deliberately considered, it leaves no doubt that the only real basis* for the verdict and judgment, the indictment and prosecution of this case *was suspicion.* * * * An addict on the platform of a railroad station anxious to get morphine for his own use picks up an express package * * * *an officer arrests him.* * * * *They then suspect this poor addict stole the order, committed the forgery, bought the draft and used the order to have the package of drugs sent.* * * * *And then their imaginations and suspicions take fire and they seem to see that this addict is a retail dealer, is a wholesale dealer in narcotics, and they indict him and compel him to stand trial.* * * * *And this vast fabric of suspicion and imagination rests upon the simple fact that the defendant picked up a small express package, walked a few steps.* * * * *'Behold what a great matter a little fire kindleth.' Fortunately the law sternly forbids the conviction of the accused upon suspicion.* The defendant ought never to have been indicted or prosecuted upon the evidence in the case. * * *"

United States v. Southern California etc., 7 F. 2nd 944, 946:

"True it is that conspirators work secretly and under cover to effect their purpose but *it is not a fair rule which would declare that under every charge of conspiracy the evidence in defense must be viewed with suspicion and distrust."*

Thus we submit that the above instruction of the judge misled the jury to think that circumstantial evidence was the only way the government could con-

vict of conspiracy, and without any qualification of such charge, the jury was led to believe that such evidence was the best evidence, and did not need to be scrutinized or to be required to bear a heavier burden in order to convict than direct evidence. This was certainly prejudicial when combined with the other errors in this case.

While it is outside the record, the newspapers both in New York, San Francisco and Colombia teemed with statements by Captain Foster, government agent, that Mayola was going to start a huge revolution in Colombia by means of this counterfeit money. These facts which were not even brought before the Court, were most fanciful and illusionary, as Mr. Mayola was and is connected both socially and politically with the party in power at the time. But as the Court said, "imaginations and suspicions take fire, and build a vast fabric of suspicion and imagination", resting on the simple fact that Mayola loaned $500.00 to a next door neighbor who was about to be evicted from his house, and whose children were ill fed. But the law while just, is stern, and will not allow any such suspicion to convict one of crime, and thus blast a life lived for 61 years in the highest esteem.

THERE IS NOT SUFFICIENT EVIDENCE IN THE RECORD TO SHOW BEYOND A REASONABLE DOUBT THAT MAYOLA HAD A UNITY OF PURPOSE, COMMON DESIGN, AND UNDERSTANDING WITH THE ALLEGED CONSPIRATORS.

The gist of conspiracy is the meeting of the minds, in the same contractual sense as a partnership. If

there was no meeting of minds, then there can be no conspiracy. In the instant case, the government never attempted to prove nor is there any evidence in support of a meeting of the minds of Mayola and Walkup. Neither was there any conduct which corroborated such an inference. For Mayola bought a ticket to New York, tended to his mining business in Panama, went on to New York and was in conference with his partner there and other persons like Mr. Bonbright. What might have gone on in the same house in another room cannot be placed by the government at Mr. Mayola's door. Neither can what happened in the home of Walkup next door incriminate Mayola. For how many of us know how our neighbor lives, or what goes on under his roof, particularly in a big city like San Francisco?

As was said in *U. S. v. Hirsch,* 100 U. S. 34, 25 L. Ed. 539:

> "The gravamen of the offense here is conspiracy. For this there must be more than one person engaged * * * *the combination of minds in an unlawful purpose* is the foundation of the offense, *and that a party who did not join in the previous conspiracy cannot* under this section *be convicted on the overt act.*"

Again, in *Sprague v. Adenholt,* 45 F. (2) 790:

> "The gist of conspiracy is the meeting of minds for a definite criminal purpose, ripened by the doing of some overt act."

There was no close association, other than a trip in the same stateroom, which Mayola testified was open

to the public, and when taken by Walkup he shrugged his shoulders in true Spanish style and said to himself Quien Sabe. And from the testimony of Armstrong and others, it can be seen that Walkup was just such an arbitrary person with one idea in his head. When he had involved the only man who had befriended himself and family, and gained nothing by it, he committed suicide.

In the case of *Dow v. U. S.,* 21 F. (2d) 816, it is said:

> "We conclude that Court should have directed an acquittal. *The evidence failed to disclose close association* of defendants prior to McWilliams' visit to the Dow farm *or that there was any combination or arrangement of any kind entered into between defendants before the time of their arrest.* * * * But in the *absence* of evidence to warrant the inference *that there was a common purpose between these two men and that McWilliams was executing the purpose there could be no verdict of guilty of conspiracy.*"

Surely in this case, if there had been any common understanding of a conspiracy to issue counterfeit money in Colombia there would have been some correspondence between Walkup and Ibanez, or Mayola. And yet the only evidence in this regard is the fact that immediately on Walkup's return, he went to the San Francisco agency of International Harvester Company requesting information on the refrigeration of milk be sent to Ibanez in Panama. Mrs. Walkup testified that he visited Ibanez' farm, and sent for this literature to fool everyone. Isn't it a fact that, as testified to by Mayola, Walkup did fool him also?

In the case of *Tinsley v. U. S.*, 43 F. (2) 890, 892, the Court carefully analyzes the insufficiency of a case much like Mayola's:

> "In Graham v. U. S., 15 F. (2d) 740, 742, this Court discusses the sufficiency of evidence to show conspiracy, and points out that conspiracy is a distinct offense from the crime which may be the object of the conspiracy and stated that, 'there must be shown to be a combination or understanding tacit or otherwise to violate the Federal Statute'. *It was held the evidence was not sufficient to show a conspiracy although one or more of the defendants were guilty of overt acts, but that two or more did not conspire to commit them. In a conspiracy there must be some unity of purpose, some common design and understanding, some meeting of minds in an unlawful arrangement, and then to make the conspiracy a crime, the doing of some overt act to effect its object.* A person does not become a part of a conspiracy by knowledge that another is about to commit a crime, or necessarily by an acquiescence in the crime. There may be certain connections of defendants with transactions claimed to be criminal which would come under the reference of Justice Holmes in U. S. v. Holte, 236 U. S. 140, 59 L. Ed. 504, to-wit, a *'degree of cooperation that would not amount to a crime'. Such degree of cooperation might be approval, or even encouragement, inactive acquiescence, and other matters which did not enter into the real plan or design of the alleged conspirators.* * * *
>
> *The enterprise seems to be a one man affair established by Tinsely and carried on by him with the aid of other parties* * * * *the evidence does not show any mutual understanding or plan* * * *

> *nor that the minds of these parties met understandingly to carry out a deliberate agreement* to commit the larcenies charged. * * *"

Again, in the case of *Ventimiglio v. U. S.,* 61 F. (2d) 619, 620, it was so held:

> "We think that this evidence is too unsubstantial to sustain the verdict. *The gravamen of the indictment is the alleged conspiracy* between Yollo, Morelli, Gallagher, and appellant to violate the statutes in question. *The proof fails to establish any common design* between the alleged conspirators. *There is no direct evidence of it, and we do not think that the circumstances justify an inference that it existed* * * * it does not appear that appellant either acted in concert with them or knew of their unlawful purposes. * * * Reversed."

Patterson v. U. S., 222 F. 599, 631, sums it up briefly:

> *"It is not sufficient* to connect any officer or agent of the National Company with the conspiracy *that they knew of it, or acquiesced in it. They must by word or deed have become a party to it."*

Mere presence of Mayola in a stateroom, or in a house without showing beyond a reasonable doubt a preconcert of plan, cannot be the basis for a criminal conviction. As was said in *Green v. U. S.,* 8 F. (2) 140, 141:

> "Conspiracy may be established by proof of concert of action in the commission of the illegal act, or other facts and circumstances, from which the natural inference arises that the unlawful overt act was in furtherance of a common design,

intent or purpose of the alleged conspirators (Williams v. U. S., 3 F. (2) 933) *yet the facts proven must be of such a character that in connection with all explanations given the jury could rightly think them inconsistent with innocence.*

Green was not present at the time Mrs. Green and Cohn were arrested. *No witness testified that Green had entered into a conspiracy * * * and no oral evidence was offered * * * tending to establish concert of action or other facts and circumstances, from which such natural inference might be drawn* other than that he was the husband of Mrs. Green and the owner of the automobile in which the intoxicating liquor was transported. *It follows that the conclusion that Green authorized the use of his automobile by Cohn that evening for any purpose is a mere conjecture, not sustained by any substantial evidence, and hence cannot be accepted as a fact proven in the case from which the further inference may be drawn that the automobile was furnished by Green in furtherance of a conspiracy, or the knowledge, that it was to be used for the unlawful transportation of intoxicating liquor. * * **

The conclusion that Green was not a party to the conspiracy * * * materially affects the natural inferences to be drawn from the facts actually proven as to Mrs. Green. *There is no proof substantially tending to show a preconcert of plan with Cohn constituting participation in the conspiracy* so that the liquor in the automobile was at any time in her possession. Possession connotes control, and transportation presupposes possession. Supplying means of transportation may constitute participation therein, *but mere presence in the automobile* (the only fact shown

as to Mrs. Green) *we do not think is such a substantial circumstance, under all the facts of this specific case as could reasonably be considered as overcoming the presumption of innocence.* Nor is it shown that Mrs. Green overturned the jug in the automobile. In order to *predicate guilty knowledge by Mrs. Green upon this additional circumstance, and thus to infer participation by her, such circumstance must be proved, and not be mere conjecture unsupported by substantial evidence.*"

Even if we go so far as to assume for the purpose of argument that Mayola knew that Walkup had these notes on his person and did not have him arrested, there could be no conspiracy without the unlawful agreement. This is held in *Di Bonaventura v. U. S.*, 15 F. (2d) 494:

"The Court. If these things alleged, still, mash, barrels and so forth, went into his property with his knowledge and consent he is an accessory to the crime of conspiracy, is what I mean to say. * * *

A landlord is not necessarily guilty of conspiracy to violate the Prohibition Act *merely because he had knowledge that liquor is being manufactured on his premises and does not stop it. The gist of the crime of conspiracy is the unlawful agreement.* Conspiracy exists whenever there is a combination, agreement or understanding, tacit or otherwise, between two or more persons for the purpose of committing unlawful act. * * * The conspiracy to commit the crime is an entirely different offense from the crime which is the object of the conspiracy. * * * Reversed."

This is strongly endorsed in *La Rosa v. U. S.*, 15 F. (2d) 479, where the Court said:

> "The vital point was, had La Rosa and Fazalare entered into a conspiracy to transport or possess liquor. * * * *We find no evidence that Fazalare had conspired with anybody to do anything. There is nothing to indicate that La Rosa had any understanding* with Martin and Belman other than that he would buy the whiskey from them and that he would show them how to get to his garage. * * * *If it does * * * seemingly any one who agrees to buy liquor from a bootlegger and tells him how to get to his back door with it commits an offense punishable by imprisonment in the penitentiary for as much as two years, and by a fine of $10,000.*
>
> Be that as it may, the statement of the learned judge, * * * he was 'convinced beyond any doubt' that the delivery 'was made to La Rosa and Fazalare by Martin and Belman pursuant to an agreement or understanding' * * *.
>
> *It does not appear that there was any legally sufficient evidence that Fazalare had entered into any conspiracy whatever* and we cannot resist the conclusion that *under all the circumstances* La Rosa was also *unduly prejudiced* by the sweeping language that came from the Bench. * * * Reversed."

Another case in point, where the defendant was riding in the same car, rather than in a stateroom, is *Hanning v. U. S.*, 21 F. (2d) 508:

> "She testified * * * she was waiting * * * for a street car * * * when Hanning came along driving a Ford sedan and made her get in. * * * After

she was in the car and they had traveled some distance, Schmidt, a Federal agent, chased them. * * * Hanning took two jugs of moonshine whiskey out of a gunny sack and broke them out of the window of the car in which she was sitting * * * at the time she accepted his invitation and got into the car she did not know there was any whiskey in the car.

The only question was whether Mrs. Vinciquerra had conspired with Hanning to transport this * * * whiskey. *The presumption was that she had not. She testified that she did not conspire and did not know he had any whiskey in his car when he invited her to get in.*

The fact that Mrs. Vinciquerra accepted Hanning's invitation to ride in his car when there was whiskey in it was insufficient to prove either that she knew there was whiskey in it, much less that she had conspired with Hanning to transport it. U. S. v. Jianole, 299 F. 496; Stafford v. U. S., 300 F. 540; Coffin v. U. S., 156 U. S. 432, 38 L. Ed. 481.

The burden was upon the United States to prove beyond a reasonable doubt that Mrs. Vinciquerra conspired with Mr. Hanning to transport this whiskey. *The legal presumption was that she did not so conspire. When all the substantial evidence is as consistent with innocence as with guilt it is the duty of the Appellate Court to reverse a judgment of conviction.* Vernon v. U. S., 146 F. 121, 123, 124; Wright v. U. S., 227 F. 855, 857; Edwards v. U. S., 7 F. (2d) 357, 360; Siden v. U. S., 9 F. (2d) 241, 244; Ridenour v. U. S., 14 F. (2d) 888, 893.

The relevant and substantial evidence in this case is not only as consistent, but much more con-

sistent with the innocence than with the guilt of the defendant Mrs. Vinciquerra of the conspiracy and as Hanning could not conspire alone each of the judgments must be reversed."

Dickerson v. U. S., 18 F. (2) 887, 892, clearly pointed out:

"The claim made by the government that the plaintiffs in error were present when the car of alcohol came in from Peoria and was unloaded, was not borne out by the evidence. While Kelso the witness at first so stated, he afterwards changed his testimony and said as he was mistaken. The *testimony of Kelso is very weak but assuming it to be true we do not think it is sufficient to charge the plaintiffs in error with knowledge of the conspiracy. The record shows very clearly that the plaintiff in error had never taken any part in the general conspiracy or scheme and never knew of its existence, never participated in the profits, or took any part in it in any manner,* unless it can be inferred from the mere fact that at the time that the alcohol was delivered to them some days after they had paid for it, they acquired knowledge that the alcohol had been shipped from Peoria. There is the further fact that they purchased a large quantity of alcohol from one or more of the conspirators. The evidence introduced by the government shows clearly neither Hunnell nor Chapman nor any of those who had to do with selling the liquor to the plaintiffs in error, gave them any information whatever concerning the conspiracy or even as to where the liquor had come from * * *

It will be further observed that Chapman was not in on the deal at all until after Hunnell and

Schaller had been unable to dispose of the product * * *

The government is here contending, as it must contend, if it claims conspiracy, that these plaintiffs in error had entered into an agreement and understanding with some of the conspirators either before or after the alleged alcohol had been shipped, to transfer, possess and dispose of this alcohol * * *

We think the most that can be said of this testimony is that *it creates some suspicion, it gives rise to an inference that the plaintiffs in error might have had some knowledge of the conspiracy at the time they purchased* the liquor from one or another of the conspirators. Assuming that if they did have such knowledge that would be sufficient to connect them with the conspiracy, but not so deciding, we *think the evidence is not sufficient to* involve the plaintiffs in error in the conspiracy. *The inference that the plaintiffs in error had guilty knowledge and participation drawn from the evidence* * * *is also consistent with the innocence of the accused* * * *

Whenever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible.

To warrant a conviction for conspiracy to violate a criminal statute, *the evidence must disclose something further than participating in the offense which is the object of the conspiracy; there must be proof of unlawful agreement, either express or implied, and participation with knowledge of the agreement.*

> The mere fact that plaintiff in error purchased liquor from the conspirators is not sufficient to establish their guilt as conspirators. The purchaser may be perfectly innocent of any participation in the conspiracy which is not to be confused with the acts done to effect the object of the conspiracy * * *
>
> *There are no facts in the record that dovetail and fit together so that a conclusion could be drawn that there was an understanding between the plaintiffs in error and those persons who entered in the scheme,* other than the mere purchase * * * Merely as a buyer he would not be a party to the conspiracy in any criminal sense. * * * Reversed."

ANY INFERENCE THAT DEFENDANT MAYOLA HAD KNOWLEDGE OF THE CONSPIRACY IS CONTROVERTED BY HIS DENIAL OF SUCH KNOWLEDGE. SUCH INFERENCE DEPENDING SOLELY UPON SUSPICIOUS CIRCUMSTANCES, THUS CONTROVERTED BY HIM AND CORROBORATED BY HIS ACTIONS BOTH PRIOR AND SUBSEQUENT THERETO, IS INSUFFICIENT TO SUPPORT THIS CRIMINAL CONVICTION.

We submit that the relevant evidence that Mayola had knowledge of this conspiracy is not sufficient to support his conviction on this count. This is supported by the case of *Sparks v. U. S.,* 241 F. 777, 788, where it was said:

> "Inferences of guilt must be based upon facts tending to show it; even a moral probability cannot take the place of legal evidence * * * that *he knew* * * * *is a matter of inference only as against his denial of such knowledge* * * * The evidence could tend to support a finding he

knew of the imminent danger of insolvency and the record is susceptible of an inference that he knew of the cashier's efforts to make a good showing, especially at statement time, and *at least he suspected* and perhaps *tacitly approved* the nature of the statement and the efforts * * * There were however many facts and circumstances which militated in favor of his innocence * * *"

This case is again strongly supported by *Linde v. U. S.*, 13 F. (2) 59, 61:

"With respect to Linde and Brown * * * *A careful consideration of the entire record convinces us that it fails to disclose any further connection with the scheme,* although the existence of such a scheme and plan is abundantly established, than the receipt of a car by each of these defendants for personal use, and without proof of the knowledge of the interstate character of the transaction. *There are a number of circumstances which would lead to the suspicion that both Linde and Brown knew that the cars sold or traded to them were stolen cars, but it does not appear that they knew whence they came or were to come, nor that they were parties to any general plan or conspiracy* having as its object the introduction of such cars from without the State for disposition and sale.

That they may have had guilty knowledge and participation rests upon suspicion only, arising from their acquaintance and association with some or all of the other conspirators; but to establish a conspiracy to violate a criminal statute, the evidence must convey that the defendants did something other than participate in a substantive offense which is the object of the conspiracy. *There*

must, in addition thereto, be proof of unlawful agreement and in this case that proof was insufficient."

In *Lewis v. U. S.,* 11 F. (2) 745, the Court said:

"It does not appear that he knew his name had been used in chartering the boat or that he had the remotest interest in it, and in our opinion the evidence was not sufficient to submit the case against him to the jury."

Again a jury is held sternly within the law in the case of *Burkhardt v. U. S.,* 13 F. (2) 841, 842:

"Burkhardt was the Sheriff of the County, having a Deputy Rollins who protected Worden in transporting the liquor * * * Rollins was arrested. Burkhardt heard of it, but it does not appear that he knew or was informed that Worden was connected with it * * *

Burkhardt was not charged with the duty of enforcing the laws of the Federal Government, but it was his duty as a County officer to prevent the unlawful transportation of liquor through Williams County. Mere failure to perform that duty did not, however make him a participant in a conspiracy to violate the National Prohibition Act *unless he purposely refrained from enforcing it, with full knowledge* of Worden's business and with the view of protecting and aiding it in which event his inaction would warrant the inference of participation therein in accordance with a common understanding. It may be conceded that if Burkhardt had been vigilant, he could have intercepted Worden on one of his numerous trips and stopped the traffic. But *lack of vigilance, as we have seen is not enough; there*

must also be proof of knowledge of the facts, coupled with an intention to aid in the unlawful act by refraining from doing that which he was in duty bound to do. *These essential elements cannot be inferred from inaction alone* * * * *nor are they to be drawn from occurrences* * * * *The argument as to all of them assumes that Burkhardt knew Worden's business—an unjustifiable conclusion unless reflected in the acts themselves.* Other facts opposed the implication. Burkhardt met Worden for the first time * * * did not see him again and was neither promised nor given any reward for suffering the illicit traffic.

"The government's case creates at most a suspicion against Burkhardt. In *view of its effect the Court should have directed a verdict of not guilty as to him, and in thus stating its maximum effect we are not depending upon our own inference and conclusions but upon that view which we think it was the legal duty for the jury to take.* * * * Reversed."

In the following case, the Appellate Court takes into consideration the fact that defendant as here took the stand and denied any criminal knowledge or association, and as here such evidence was corroborated by his actions as a mining man, both prior to and subsequent to the alleged overt act.

Bartkus v. U. S., 21 F. (2) 425:

"The most that can be said of the evidence relating to occurrences before the Company became bankrupt is that it shows that some time before the bankruptcy some merchandise which had been purchased by, and therefore was at

the time owned by the bankrupt found its way into the possession of Kelp, Nevar and Dronsuth * * * that (they) were brothers in law of Bartkus, that they were engaged in the same business as (he), that their place of business was about a mile from his, while the garage in which the merchandise was found was three or four miles away and that * * * Bartkus had informed them that the Bridgeport Company was in need of money.

These are the suspicious circumstances relied upon by the government's counsel.

The fact that some merchandise found its way into the possession of Kelps et al even under the suspicious circumstances mentioned does not go far to establish that they conspired with Bartkus to commit the crime. The record shows that the merchandise which found its way into this garage was not of large amount or value.

Though we may not weigh the evidence we deem it proper to say that it appears from the record that Kelps et al took the witness stand themselves and gave testimony, which if true, disposes of the incriminating circumstances urged against them. Their *testimony was corroborated and was not contradicted.* * * * Reversed."

While Courts uniformly hold that it is a delicate judicial function to supervise and if need be set aside the finding of a jury, where the evidence is insufficient, as in this case, no hesitancy is felt, for the Appellate Court is the last resort of the accused wherein his constitutional rights can be protected. And such action is fundamental for our forefathers

could see that this was the very reason for the setting up of our present appellate judiciary. In the case of *United States v. Cohn,* 128 F. 615, 618, the Court pointed out:

> "It remains to point out with some particularity the reasons for the decision that the evidence concerning Cohn was insufficient to justify the verdict against him. *It is a delicate judicial function to supervise, and, if need be, set aside the finding of a jury of such marked intelligence and unabated attention as the jurors in the case possessed and observed. But not even a proper concern for governmental interest, or the public welfare, or for a sturdy enforcement of the law, warrants the maintenance of a verdict that is unsupported by sufficient evidence of guilty connection with the crime charged.* It is not a mere connection with the business of the importing firm involved nor relation to some acts that the law required to be done in the course of passing goods through the customs house, that is demanded. Such connection must exist and such relation * * * must arise even if the importations were legitimate. *It must inevitably appear that such connection was used or such relation assumed for the purpose of subserving the conspiracy.* * * *
>
> The question now arises whether the mere fact that Cohn made such entries of itself is any evidence of his guilty connection with the fraudulent scheme. Had these entries been made by a partner in charge of the purchasing department or * * * connected with the importations * * * the fact would have been strong supplemental evidence of guilty participation.

* * * There is no specific evidence as regards Cohn nor does it appear that he was in a position where he would be likely to obtain such knowledge. *Therefore the fact that his name appears upon the entries is quite as consistent with his innocence as with his guilt. But when the circumstances under which he signed the entries are taken under consideration there is no ground for holding that the mere fact of signing the entries showed that he was a participant in the fraud of which they were a part.* * * *

Taking into consideration the large extent of the business, its widespread transaction, the supreme power which Rosenthal exercised over it, the necessary division of business in departments * * * so totally divorced and unrelated * * * the fact that he was a new member of the firm * * * for only six months and presumably had not yet had his first accounting with Rosenthal, *it is thought that a verdict that he must have been conscious of the existing frauds and favorable results to the firm was not justifiable.* * * *

While therefore all this *class of evidence might create suspicion of knowledge* on the part of Cohn, of which he availed himself as a member of the firm * * * *looking at it as strictly legal evidence* that *it is not sufficient to connect Cohn with the conspiracy, so that it can be said beyond a reasonable doubt that he is guilty.*

The evidence shows that Cohn had no specific connection with a single act, fact or circumstance relating to the purchase, invoicing, shipping or importation of the goods * * * that after their arrival his sole relation to them was that he made

> entries; *that his brief connection * * * and relative duties * * * do not justify an inference that he obtained knowledge of the fraud.*"

There is no doubt that in this case, trying Mayola together with a confessed criminal, and constantly bringing another confessed criminal before the jury, the latter having the most fanciful ideas from time to time, as related by Dinely, such complicated testimony was apt to become a confused jumble as to Mayola, and all this irrelevant testimony left the impression upon them that Mayola was guilty of something, with little reference to conspiracy. This was said in the following case, in which the number of persons tried for conspiracy was largely in excess of the instant case, but we submit it applies with equal force. In *Marcante v. U. S.*, 49 F. (2) 156, 158:

> "We cannot find any evidence that the appellants *knew* of any such general conspiracy. * * * *Nor can we find any circumstances from which a jury might legitimately find that Marcante or Bell had any other purpose in mind than that of carrying on their own individual operations.* * * * *It is extremely difficult for an experienced judge to trace the skeins of scattered testimony to so many individuals, with inexperienced jurors, such complicated testimony is apt to become but a confused jumble, and a verdict too apt to represent an impression that the defendants are guilty of something*, with little reference to the crime with which they are charged. * * *"

THERE IS NO EVIDENCE SHOWING THAT MAYOLA HAD A WRONGFUL OR UNLAWFUL INTENT, WHICH IS AN ESSENTIAL ELEMENT TO SUPPORT HIS CONVICTION.

There must be intent to commit a crime. This is elementary in the study of criminal law, and such intent must be proved beyond a reasonable doubt.

Chadwick v. U. S., 141 F. 225, 243, points this out:

> "The conspiracy itself is one created by statute and is made out by evidence that its object was to perpetrate some offense against the United States. Undoubtedly something more than a mere certification in excess of a deposit is necessary to make the offense punishable * * * *a wrongful intent is of the essence of the matter* and the act of certification must be wilful and charged as such. *There must be an evil design, a wrongful purpose.* Therefore wilful ignorance as to whether the drawer had money on deposit or not, or knowledge that he did not must be shown. * * * An unlawful intent may be implied from the intentional doing of an unlawful act."

Again in *Salas v. U. S.,* 234 F. 842, 845, it is set forth:

> "The statute clearly contemplates that the parties *shall intend* to defraud the United States and the indictment charged *such an intent.* * * * *We discover nothing in the evidence to justify the jury in finding, at least beyond a reasonable doubt that Salas knew* anything about these complicated relations. * * *"

Nosowitz v. U. S., 282 F. 575, 578, points out:

> *"It has always been the law* (unless otherwise prescribed by statute) *that to convict one of crime requires the proof of an intention to commit a*

crime. * * * There is no presumption created by statutes which presumes that possession of a vessel that might be used as a still or part of a still to be unlawful. The *act* of manufacturing *must have coupled with it a specific intent to do the wrong.* * * * *Such intent must be proved as an independent fact, or at least circumstances established from which it would be proper to permit a jury to find such intent.* * * * *We may not indulge in the presumption* that these cans were possibly of use for unlawfully manufacturing intoxicating liquor, *for we cannot presume that men will do wrong.* * * * *We can conceive of many lawful purposes that the vessels could be used for."*

We cannot presume that the $500.00 loaned to Walkup was loaned with a wrongful intent, for it cannot be presumed that men will do wrong. We can conceive of many lawful purposes that the $500.00 could be used for, all of which purposes Mayola testified he loaned it for.

Landen v. U. S., 299 F. 75, 78, pointed out that:

"When, however, the prosecution is for conspiracy the textbooks and elementary discussion seem to agree that *there must be a 'corrupt intent' which is interpreted to mean mens rea, the conscious and intentional purpose to break the law.* Bishop's Criminal Law (8th Ed.), Secs. 297, 300, 12 C. J. p. 552, 165 R. C. L. p. 1066, p. 6. *The principle that even a mistake of law may protect one accused of crime* has familiar illustration in the rule that, if the respondent in a prosecution for larceny took the property in a good faith though erroneous, belief that he had a legal right

to its possession, he is not guilty. * * * *This principle was applied to conspiracy* in People v. Powell, 63 N. Y. 88, 91, 92. In a careful opinion by Judge Andrews *the difference between the intent involved in the substantive offense, which intent the law will imply from the act,* and the *'corrupt intent' necessary to make conspiracy which intent does not necessarily follow from a plan to do the act, is clearly pointed out.* The case has stood for 50 years as the leading one on the subject, and if it be *confined as it is, to a plan to do an act 'innocent in itself' it has never so far as we find been questioned.* * * *"*

The loaning of the money, the going on the boat, introducing Walkup to his friends to get him a job, or to help him organize a milk condensing or refrigeration business, are all acts innocent in themselves, and cannot imply unlawful intent beyond a reasonable doubt.

Fall v. U. S., 209 F. 547, 552, holds that:

"Here the question is not one of criminal pleading but of evidence. * * * In this case *there was no direct evidence of any conspiracy. The proof of that rested upon circumstances.* More than usually in criminal cases the condition of the minds of the Falls was important. It is laid down that *in conspiracy there must be intentional participation in the transaction with a view to the furtherance of the common design or purpose.* * * * *What we mean is that an intention to take part in a conspiracy is always essential to the commission of the crime of conspiracy. A man is presumed to intend the natural and ordinary result of his own acts,* and conse-

> quently if one does an unlawful act it is presumed that it was done with a criminal intention *but this presumption is not a conclusive one and may be rebutted by the defendant.* * * *"

Even thus, if the act were unlawful, a presumption that it was done with criminal intent is not conclusive but may be rebutted by defendant, and Mayola certainly rebutted any such presumption. But in his case none of the acts relied upon were unlawful. All were innocent.

Again in the case of *Farmer v. U. S.*, 223 F. 903, 907, it was held that inference cannot make out full intent:

> "Upon a careful examination of the record we are satisfied that the *government failed to prove an intent by the conspirators* * * * to use the mails to effect the scheme. Direct evidence of intent is rarely available, it may be shown by circumstances. Usually when the scheme is unfolded it is apparent that it could not be carried out without using the mails and a jury is warranted without further proof in drawing the inference that those who devised the scheme intended to use the mails. *We do not find in this record sufficient to warrant the inference.* * * *Since inference is not enough to make out full intent, and there is no direct evidence of it, we think* * * * *it should be reversed.*"

Thus we submit mere association in the same stateroom does not properly support the presumption of wrongful intent. This is borne out by a case where

the facts were quite similar. *Jianole v. U. S.,* 299 F. 496, 498, held that:

> "All that we have here, however, is the fact that the defendants were together in an automobile that contained the liquor, which the defendant, according to his evidence did not know was there. * * * The indictment here charges a *felony* and accordingly *requires proof of knowledge of facts* on defendants' part *upon which an intent to engage in the conspiracy may be inferred. Mere acquiescence is not sufficient. The evidence must show participation. Mere failure to prevent another from committing a crime is not sufficient.*"

Mayola was once in a room which contained the counterfeit money for 15 minutes. Later he was in a stateroom with a man who had it secreted on his person. But nowhere in the evidence is there any evidence showing Mayola participated. There is no evidence even that he knew that the money was in the house or in a secret belt. Assuming that he did know and failed to prevent the transportation, it would not be enough. This element of active participation is insisted upon in *Turcott v. U. S.,* 21 F. (2) 829:

> "The law is well settled that *active participation must be established. Mere knowledge of the illegal acts of others is not sufficient.* The evidence relied upon to connect plaintiff in error with the conspiracy is *uncontradicted but it is wholly insufficient to warrant the conclusion of active participation* * * * and the cause is reversed."

This necessity of proving active participation is again made the grounds for reversal in *Young v. U. S.*, 48 F. (2) 26:

> "The most that can be claimed by the government is that the circumstantial evidence was sufficient to show that McDaniel, Young and Coates *knew* that the articles in question were being *bought* from Young and Coates *by persons who intended to use them in connection with the unlawful manufacture of liquor. We are of the opinion that this evidence was insufficient.* * * * There must have been a conspiracy to do something unlawful after the sales were made in order to sustain the indictment. U. S. v. Katz, 271 U. S. 354, 70 L. Ed. 986. * * * *One cannot be held as a member of a conspiracy upon proof merely that he had knowledge of, or negatively acquiesced in, a crime that was about to be committed; but in order to fasten guilt upon one accused of being a conspirator, it is necessary to prove that he actively participated in the conspiracy charged.* Bishops Criminal Law (9th Ed.), sec. 633, 5 R. C. L. 1065. * * *"

Assuming that Mayola gave his full sympathy and approval to Walkup's plans, which he denied, such sympathy and approval without more would not be sufficient to sustain his conviction.

> *McDaniel v. U. S.*, 24 F. (2) 303.
>
> "It is true that McDaniel's testimony, if believed by the jury, was sufficient to authorize an acquittal. *His knowledge* that others were in a conspiracy to violate the law, and *his full sympathy with and approval of the object of that conspiracy without more, would not constitute him a conspirator.*"

THERE CANNOT BE FOUND ANY MOTIVE FOR MAYOLA ENTERING INTO THE CONSPIRACY. AND MOTIVE IS A NECESSARY ELEMENT OF THIS CRIME.

Once the fires of imagination cooled off and the government agents gave up their theory that Mayola was going to overthrow the government of his country, because that government in power consisted of his relatives and trusted friends, it was attempted to show by the judge's cross-examination, that he was in reality a poor man and thus his motive might have been to make money. This evidence we have challenged as it consisted of statements to Mayola which he had to deny under conditions which placed the judge in a superior light before the jury, or questions which were argumentative, or so repeated as to almost amount to an intimation that the oft repeated answers of Mayola were untrue.

As a matter of fact Walkup was poor, and no business man, and Mayola was good hearted, and loaned him some money. He stopped off at Panama and obtained powers of attorney which were introduced in Court, and went on to New York and his activities in New York were carefully scrutinized, by government agents, who laughingly told Mayola that as far as they were concerned, they did not have a thing on him. And they released him for about ten days, without surveillance. Did he try to get out of the country, as a criminal? No, he did not. He hastened home upon arrest, and stood trial and took the stand freely on his own behalf. We challenge the record to show any intent.

We ask this Court to take into consideration the following case, which we consider far more serious than anything Mayola did, and yet the Court reversed it for lack of intent.

Donovan v. U. S., 54 F. (2) 193.

"Wells was disinclined to be imprisoned for any term therefore an arrangement was made with Patrone whereby for a consideration he agreed to impersonate Wells, receive his sentence and serve his term. In due course Beals and Patrone the latter substituted for Wells signed pleas of guilty to the charge of smuggling and appeared before the bar for sentence. The Judge in complete ignorance of what was being done imposed sentence upon Beals and Patrone in the name of Wells. * * * Who did this thing? The Grand Jury indicted Wells, Patrone, Beals, Donovan (attorney) and Rossiter (attorney) for conspiracy. * * *

Beals' case was precisely the opposite of Donovan. Though doubtless he knew much of what was going on, and when he and Patrone stood up for sentence he certainly knew that the sentence was not imposed upon Wells, his fellow prisoner, but upon another in Wells' name, he was, oddly enough, not an actor in the fraud. Whether through lack of interest or through fear, his part was passive. *We find no evidence that he did anything to further the scheme or, indeed, to deceive the Court other than to stand mute. He possessed guilty knowledge in full measure, and it was, without doubt, his moral duty to speak and apprise the Court of the fraud being perpetrated. Yet reprehensible as was his silence, he was here tried and convicted not for having*

*guilty knowledge and not for violation of 146 * * * but for conspiracy.*

We fail to find any evidence of acts on his part either in *originating or furthering these conspiracies,* just as we *fail to find any evidence of a motive on his part for entering into such conspiracies.* So far the evidence discloses he merely stood by and watched the game with indifference. We are required to hold that Beals' conviction is not sustained by the evidence.

Rossiter was attorney for Wells and Beals. * * * Upon their release * * * he withdrew as their attorney. That Wells and Beals employed two Pittsburg attorneys is not disputed nor is it disputed that these attorneys alone acted for Wells until at least a day before sentence. Thus on the government's testimony there was a period when Rossiter took no part in the case, and certainly there was no evidence that he took part in or knew of the deal for the substitution. * * * On the government evidence Donovan the day before the sentence telephoned Rossiter that 'it was Ok and to bring his clients from Erie.' This message Rossiter explains was in response to his request of Donovan to let him know when the matter was definitely fixed. * * * *Rossiter's next contact occurred the next day when with his three clients he met in the corridor outside the courtroom, the Wells and Beals group. * * * When approaching the courtroom door he said 'Come on inside and get the thing over with.' * * * Everybody went into the courtroom. Rossiter's clients were sentenced. While Rossiter took no part in the Beals Patrone proceedings, he was present all the time and there is no doubt that he could have seen and heard all that transpired. It was*

*permissible for the Jury to find that he did see the substitution and did hear the Court impose sentence on the substitute. Like Beals he stood mute. After sentence * * * all the lawyers including Rossiter went to rooms previously reserved in a hotel and had lunch, at which it was testified Rossiter said 'We have put it over.' At lunch the Bail money was divided. * * * There was no evidence * * * that Rossiter got any of it. Nor was there evidence* that Rossiter was attorney for Wells and *Beals other than his silence when he saw as he must have seen Patrone substituting for Wells* at the time sentence was imposed. So *the case against Rossiter gets down to a permissible inference of guilt from this fact and his failure to speak.*

Being an attorney—and officer of the Court—it was unquestionably Rossiter's duty to apprise the Court of the fraud. *Yet in reviewing this trial we are not dealing with official duty, professional ethics or morals. We are coldly concerned with the law to be applied to the facts and with permissible inferences of guilt to the exclusion of everything else.*

If the facts were equally susceptible of inferences of innocence in respect to the offenses for which he was on trial—this disposes of the matter. Graceffo v. U. S., 46 F. (2) 852.

Finding in the record no substantial evidence of facts which exclude every other hypothesis than that of guilt we are constrained to hold the evidence does not sustain Rossiter's conviction."

Neither was there any agreement that Mayola should have any profit, nor any expectation of profit. It was rather a crack brained scheme of a person,

who obtained the money for one purpose, and who used it for his own purpose, and who involved Mayola for the sake of hoped for leniency.

Salinger v. U. S., 23 F. (2) 48, 51, points this out:

> "While counsel for the government have called attention to *much circumstantial evidence* * * * the written contract *the direct evidence of the parties* * * * *the absence of any agreement that the defendant or any of the defendants should have any interest, share or expectation of profit in or from the Christenson transaction* * * * *have converged with compelling force to convince us that there was not in this case such substantial or relevant evidence as could sustain beyond a reasonable doubt* * * * *a finding.* * * *"

Again in *Buchanan v. U. S.*, 233 F. 257, 258, the Court said:

> "The legal quality and consequences of an act are not always apparent or definitely indicated. Some acts are of such equivocal or ambiguous *character that the judicial inquiry turns wholly upon the particular motive which may be disclosed by intrinsic evidence.* * * * *It is immaterial whether the statements were true or false, the fact that they were made was material.* * * *"

Thus it remains, that it is immaterial that the statements of Walkup that he really wanted to go into the milk business are true or false. The fact that he made them to Mayola and Mayola believed are material.

THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO CONNECT THE OVERT ACT, THE LOANING OF THE $500.00 WITH THE CONSPIRACY.

The overt act was the loaning of the $500.00 which as Mayola testified to, was the act of a decent neighbor to help a starving family in distress, after having been importuned for months. That Walkup used the money ill-advisedly, and in connection with an unlawful conspiracy in no way connects Mayola with the same conspiracy, any more than if Walkup had borrowed the money from a bank. As was said in *U. S. v. Grossman,* 55 F. (2) 408, 410:

> "The elements of a criminal conspiracy are: *First an object* to be accomplished, *a plan or scheme* embodying means to accomplish that object, *third an agreement* or an understanding between two or more defendants *whereby they became definitely committed to cooperate* for the accomplishment of the object by the means embodied in the agreement, or by an effectual means, and *lastly an overt act.*
>
> *However before the overt act can be taken into consideration, it must be found that the defendants were parties to the conspiracy.* * * *
>
> *The overt act must be entirely independent of the conspiracy.* It must not be one of a series of acts constituting the agreement, but *it must be a subsequent independent act following a complete agreement or conspiracy, and done to carry into effect the object of the original agreement.*"

And we submit that the evidence in the instant case falls far short of the above elements.

This is so even if defendant had a bad reputation. Mayola had an unimpeachable reputation.

Dolff v. U. S., 61 F. (2) 881, 885, holds that:

> "We are in accord with the statement of the district attorney that the evidence relied upon to sustain the conviction of appellant Proost is not overwhelming * * * three officers testified that Proost's reputation as a peaceful and law abiding citizen * * * was bad * * * We are convinced that the evidence is not sufficient to sustain the charge * * * there cannot be much doubt that he was violating the law in possessing, bartering, and transporting liquor, but there is *no evidence that his transactions* in these respects *were in any way connected with the conspiracy* * * *"

As was said in *Tillinghast v. Richards,* 225 F. 226, 232:

> *"The overt act * * * must be something more than evidence of a conspiracy* * * * thus a complete confession of a conspiracy would not be equivalent *to an overt act which must constitute execution or part execution* * * *"

Neither can Walkup's acts be imputed to Mayola. *U. S. v. M'Clarty,* 191 F. 518:

> "We come to the consideration of the question whether the failure of the accused to inform Lloyd, the bookkeeper, of the facts respecting the drafts drawn by Bickel made the act of Lloyd in putting the entries on the Bank's books the 'act' of accused * * * *We think this question must be answered in the negative although * * * the accused, the President of the Bank, was most unfaithful to the manifest moral duty* of giving full information and accurate directions to the bookkeeper * * * *Doing an act * * * we*

> *think must involve positive conduct* on the part of the doer *and not mere passive inaction*—that is to say, to bring a case within the statute, *the conspirator must himself 'do' the 'act' or give authority to another to do that particular thing* for him. *A mere failure on the part of the conspirator to prevent another from doing the act of his own volition cannot be sufficient* unless we disregard clearly established canons of statutory interpretation * * * *the 'act' to effect the objects of the conspiracy must actually be done by a conspirator,* or if not actually done by him in person, *it must be done by another by actual and intentional procurement of the conspirator. Imputation to one person of the acts of another cannot in criminal cases find adequate basis in mere moral or argumentative considerations. Criminally a man can only be held responsible for what he actually does or actually procures to be done.* In short we think *the case stated * * * is not 'plainly and unmistakably' within the statute* to use the language of the Supreme Court."

The jury had no right to draw an inference without substantial evidence, in a criminal case. In the case of *U. S. v. Ault,* 263 F. 800, 804, it was properly pointed out:

> "An act then which would not have a tendency to produce, cause, execute, enforce, achieve, accomplish, or bring about the unlawful enterprise would not be an overt act * * * *A court or jury has no more right to draw inferences from facts that do not necessarily and legitimately authorize such inference, than to find any other fact without evidence* * * * Chief Justice Marshall * * * said * * *

'The rule that *penal laws are to be construed strictly* is perhaps not much less old than construction itself * * * to determine that a case is within the intention of the statute, its language must authorize us to say so. It would be *dangerous indeed to carry the principle that a case which is within the reason or mischief of the statute* is within its provisions so far as to punish a crime * * *'

If completed acts separately stated are not crimes, many may not be united in a conspiracy charge as overt acts and made criminal.

This is a government of laws under the constitution administered by men selected from the citizenry of the United States and all persons charged with crime stand unprejudiced by the passions of the times.''

The following case shows how far the Courts have gone to reverse cases founded upon suspicion or conjecture even when the overt act is unlawful in itself, and not as here a simple innocent loan to a needy family. *Davidson v. U. S.,* 61 F. (2d) 250, 253, strongly supports our contention:

''Of course, it is apparent that Davidson and Brummel, knew that they were handling a so-called 'hot' car, and that they adopted this plan of issuing a constable's bill of sale in order to obtain apparent title in the hands of the purchaser. *The conclusion is irresistible that both * * * prostituted their official position as officers in furtherance of a scheme to dispose of a car that they knew to be stolen * * **

* * * but there is an utter absence of any testimony that Davidson and Brummell were par-

ties to any conspiracy as alleged * * * The *fact that in selling this car Davidson and Brummell aided the conspirators is not sufficient. It is necessary that there be proof of an unlawful agreement,* either express or implied. *True, proof of overt acts is sometimes sufficient to prove a conspiracy but the overt act or acts must be clearly referable to an unlawful conspiracy or agreement,* and as far as the acts of these two defendants are concerned, *they are as consistent of their innocence of the charge of conspiracy as their guilt. There is no evidence that indicates any participation on their part with knowledge of the conspiracy.*

The only codefendants known by Brummell were Davidson and Gillette, Davidson knew only Brummell * * * *One may suspect or conjecture that Davidson and Brummell were acting as 'fences'* for stolen cars transported in interstate commerce in pursuance to some conspiracy, *but the evidence does not justify such a conclusion.* The evidence would warrant the view that these defendants * * * conspired with Gillette to sell a stolen car, but that conspiracy is not the one charged * * * There is no evidence nor any circumstance whatsoever which even remotely indicates that these two defendants had any knowledge that this was an interstate car, or that Gillette was engaged in transporting a car or cars in interstate commerce * * * There is no evidence which indicates that they had any connection with the original theft * * * nor with the transportation * * * nor indeed with the storage * * * *The subterfuge * * * and the false statements * * * strongly infer that they knew that they were handling a stolen*

*car, but such circumstances cannot supplant the absence of testimony or circumstance * * * it must appear * * * that these defendants * * * had knowledge of the interstate character * * *"*

In conclusion, we therefore pray this Court to reverse the verdict and judgment as to Mayola, and to grant him a new trial in which he will be able to obtain a fair trial such as that term is known to our Constitution, and the decisions of the Federal Courts, cited herein.

Dated, San Francisco,
November 27, 1933.

Respectfully submitted,
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